

SOURCE LICENSING

HEARING

BEFORE THE

SUBCOMMITTEE ON

PATENTS, COPYRIGHTS AND TRADEMARKS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

S. 1980

A BILL TO AMEND TITLE 17, UNITED STATES CODE, REGARDING THE
CONVEYANCE OF AUDIOVISUAL WORK, AND FOR OTHER PURPOSES

APRIL 9, 1986

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SOURCE LICENSING

WEDNESDAY, APRIL 9, 1986

U.S. SENATE,
SUBCOMMITTEE ON PATENTS,
COPYRIGHTS AND TRADEMARKS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, in room SD-226, Dirksen Senate Office Building, Hon. Charles McC. Mathias, Jr. (chairman of the subcommittee) presiding.

Present: Senators Hatch, Specter, McConnell, Simon, DeConcini, Leahy, and Kennedy.

Staff present: Steven Metalitz, chief counsel; Ken Mannella and Matthew Gerson, counsels; Sharon Donovan, staff member; Pamela Batstone, chief clerk; John Podesta, minority chief counsel (Subcommittee on Patents, Copyrights and Trademarks); Diana Waterman, general counsel; Cindi Blackburn, counsel (full committee); Beverly McKittrick, counsel for Senator Laxalt; Randy Rader, counsel for Senator Hatch; Debbie McIlroy, counsel for Senator Specter; Carolyn Osolinik, counsel for Senator Kennedy; Ed Baxter, counsel for Senator DeConcini; and Peggy Mainor, counsel for Senator Heflin.

OPENING STATEMENT OF HON. CHARLES McC. MATHIAS, JR., A U.S. SENATOR FROM THE STATE OF MARYLAND, CHAIRMAN, SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

Senator MATHIAS. The committee will come to order.

The Subcommittee on Patents, Copyrights and Trademarks convenes today to consider S. 1980. This legislation was introduced by the chairman of the full committee, the distinguished Senator from South Carolina, Mr. Thurmond. Mr. Thurmond had intended to be here for the opening of the hearing. He has been delayed by other matters. But if there is no objection, we will reserve for him the privilege of inserting his statement in the record.

[Prepared statement of Senator Thurmond follows:]

PREPARED STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Mr. Chairman: I am pleased that you have scheduled this hearing. The application of the blanket license system to the music on syndicated programs is, indeed, an issue in need of a full and fair review. Many of us in the Senate and in the House already believe that this is an area in need of legislative reform.

To date, at least 15 Senators have joined me in cosponsoring S. 1980 and at least 130 Congressmen have joined Congressman Boucher in cosponsoring the companion bill H.R. 3521 to provide for a fair and equitable reform to the process of licensing

music which accompanies syndicated programs broadcasted on television. These bills already enjoy broad bipartisan support in both Chambers. Further exposure of the existing problem should serve to enhance that support.

Our Founding Fathers, in their wisdom, specifically entrusted Congress to ensure a balance of rights in copyright law between the creators and users of intellectual property. I believe that the existing copyright law does not strike such a balance as it is applied to music used in syndicated television programs.

The problem addressed by S. 1980 can be best explained by a brief discussion on how the current system works for licensing performance rights in television music.

Today, when a local television station buys the right to broadcast a syndicated program, all of the performance rights for copyrighted works embodied in that program are included in the purchase price except for one: the right to broadcast music on the soundtrack. The local television station must separately buy permission to broadcast the music even though the music is already embodied on the soundtrack of the syndicated program.

Generally, the effect of this is to require the local station to go to one of two societies, ASCAP and BMI, to buy a blanket license to broadcast the music on the soundtrack. These two societies currently issue over 95 percent of all blanket licenses. I use the term blanket license for a good reason. The local station is required to buy the "blanket" right to use all 3 million of the compositions controlled by ASCAP or all 1 million of the works controlled by BMI, even though the actual soundtrack of the program involved may contain no more than one or two copyrighted songs.

There are those who will assert that the alternatives of source licensing is currently available to broadcasters. However, the practical and economic reality of the situation is that these local television stations have almost no bargaining power as they seek to purchase the right to broadcast the music on a prerecorded soundtrack. They cannot deal with ASCAP and BMI in an arms-length transaction as that term is ordinarily understood in the marketplace. The local broadcasters have no other alternative but to confront these two giants who are able to insist on a blanket license on a take-it-or-leave-it basis. The stations have already purchased broadcast rights in a program, but those rights are virtually worthless without the accompanying right to broadcast its music. Under these circumstances I believe the current licensing system is hampering free market negotiations.

It is important to recognize that those who make television programs are the primary beneficiaries of this system. Although ASCAP and BMI collect the money from local stations, most of the money goes back to these corporations. This is because most of the music used on television is composed by employees of the studios which make the shows, not by independent composers. The studios get paid twice. They are paid by the television station to broadcast the program and in addition receive payment as members of ASCAP and BMI.

I am aware of the concerns expressed by songwriters regarding the perceived impact of S. 1980. These songwriters can be assured that this legislation is not in any way designed to allow local broadcasters to avoid the obligation to compensate performers, composers, or publishers for the use of the music they have created. Rather it proposes a fairer and more logical method of arriving at a mutually acceptable license fee for such use by replacing the current blanket copyright with a "source licensing" system.

Source licensing of music performance rights is not a new idea. On the contrary, this system has been used for decades with respect to music on soundtracks of films shown in movie theaters. The simple principle of fairness—you pay for what you use—that led to the adoption of source licensing for movie theaters in the 1940's should be applied to local broadcast of syndicated programs in 1985.

S. 1980 will accomplish this. It is my hope and belief that in doing so the benefit of a fair and efficient market for the negotiation of music rights on syndicated programs will be enjoyed by composers, as well as broadcasters and viewers. Composers could benefit by the availability of new "local" markets for television music and because source licensing would allow bargaining for identifiable compositions, creators could negotiate a fee that reflects the true value of their work.

Senator MATHIAS. The purpose of this legislation is to amend the copyright law to require that the performance rights in the music embodied in nonnetwork television programming must be included when the syndicator sells the program to a television station.

Now, this is a very short bill. It does not employ very many words. But its impact on broadcasters, producers, syndicators, and

composers will be far-reaching, as I think is indicated by the interest and attendance in the room here this morning. Indeed, it would change the way that they have done business since the birth of television.

Under existing copyright law, composers enjoy several distinct rights in their musical creations. Two of these rights are of particular importance with regard to music in television programs. The first is the right to synchronize the music to the action in the program. And this right is sold by the composer to the program producer so that the soundtrack, including the music, can be created.

I recently saw a very interesting television program on this very subject.

The second right is the right to publicly perform the music. Currently, this right usually is sold to the television station through one of the performing rights societies so that the station can publicly perform the music embodied in the program.

S. 1980 would require the syndicator of the television program to acquire the public performance right from the composer and to sell that right, along with the rest of the program, to the station. Then the television station could publicly perform the program and the music without any further licensing from the composer. S. 1980 would mandate this so-called source licensing as the only way for television stations to acquire performance rights in the music in syndicated programs.

This basic alteration in longstanding industry practice enjoys the support of the television industry, and we are pleased to have representatives of that industry here with us today to explain to us their perception of the need for this change in the copyright law. Also with us are representatives of the performing rights societies and of the various producers who are opposed to this change in existing law. And we will also hear the testimony of the Register of Copyrights.

We look forward to a full analysis of the complicated issues raised by this legislation. Whenever legislation is proposed that will fundamentally alter long-established business practices, it is legitimate to ask two questions: Why is the change needed? And is legislation necessary to achieve such change? Necessarily, the proponents of such a change bear the burden of answering these questions.

[A copy of S. 1980 follows:]

99TH CONGRESS
1ST SESSION

S. 1980

To amend title 17, United States Code, regarding the conveyance of audiovisual work, and for other purposes.

IN THE SENATE OF THE UNITED STATES

DECEMBER 18 (legislative day, DECEMBER 16), 1985

Mr. THURMOND (for himself, Mr. ZORINSKY, Mr. EAST, Mr. SIMPSON, and Mr. KERRY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 17, United States Code, regarding the conveyance of audiovisual work, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That (a) chapter 1 of title 17, United States Code, is amend-
4 ed by inserting between section 112 and section 113 the fol-
5 lowing new section:

6 “§ 112A. Limitations on exclusive rights: use of musical
7 works in syndicated television programs

8 “(a) Notwithstanding the provisions of section 106, no
9 owner, assignee, or licensee of a copyrighted audiovisual
10 work may convey the right to perform publicly such work by

★(Star Print)

1 a non-network commercial television broadcast without si-
2 multaneously conveying the right to perform in synchroniza-
3 tion any copyrighted music which accompanies such audio-
4 visual work.

5 “(b) Notwithstanding section 101 of this title, for pur-
6 poses of this section, ‘audiovisual work’ means any motion
7 picture, pre-recorded television program, or commercial
8 advertisement.”.

9 (b) The table of sections for chapter 1 is amended by
10 inserting between the item relating to section 112 and the
11 item relating to section 113 the following new item:

“112A. Limitations on exclusive rights: Use of musical works in syndicated televi-
sion programs.”.

12 SEC. 2. This Act shall become effective upon the date of
13 enactment, except that the provisions of section 1 shall not
14 apply for a period of up to one year after such date in the
15 case of a public performance, authorized between the date of
16 enactment and the date one year after such date of enact-
17 ment, by a contract executed prior to the date of enactment.

○

Senator MATHIAS. I would like to welcome our first witnesses. The distinguished Senator from Tennessee would, by the very nature of things, have a considerable interest and knowledge about the music industry since he represents the capital of country music, Nashville. But Senator Gore brings a broad knowledge of the communications industry and its practices, in addition to his indigenous knowledge of country music.

Representative Boucher from Virginia is a member of the House Judiciary Committee. He is the chief sponsor of companion legislation in the other body, and we will ask him to join Senator Gore at the table.

There are a number of witnesses who will want to be heard this morning, and we want to try to get everyone in by noon when we will have to adjourn this hearing. So I will ask every witness to summarize their testimony as briefly as possible. And I will at this point direct that the full written testimony of each witness be included in the hearing record.

I think most of you are familiar with our "red light-green light" system. When you have the green light, you can talk, but when the red light goes on, the gavel is going to fall.

Now, before I ask Senator Gore for his testimony, let me see if Senator Specter or other members have any comments.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman. Just a word or two.

I consider this a very important bill. It involves very fundamental interests of composers and also important interests of broadcasters. I regret that I will not be able to be here for the full session. The Attorney General is appearing in a few minutes before the Appropriations Committee, and I must be there. But I do intend to return and, Mr. Chairman, I have a number of questions to ask for the record if I am not able to be here personally. I will be following the matter very closely with an open mind.

Senator MATHIAS. In the event you are detained, your questions will be included in the record and we will ask witnesses to respond in writing so that their responses can be included.

Senator SPECTER. Thank you, Mr. Chairman.

[Prepared statements of Senator DeConcini and Senator Hatch follow:]

PREPARED STATEMENT OF HON. DENNIS DECONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Mr. Chairman: I want to thank you for scheduling this hearing this morning. The issue of source licensing is a very complicated and complex one. I am hopeful that we will understand it a lot better after this hearing. From looking at the list of witnesses that you have assembled, I am sure that this will be the case. I have discussed the question of how best to compensate songwriters for music used in syndicated television programming with parties on all sides of the issue. I have listened to the broadcasters in Arizona explain how intolerable the present situation is. I have listened to the songwriters and composers explain how unfair and unnecessary the system proposed by S. 1980 is. And I have discussed with the producers of television programming how unworkable and burdensome S. 1980's procedures would be for them. Mr. Chairman, all of these groups make persuasive arguments in favor of their position on S. 1980. I am looking forward to the testimony presented at this hearing to bring some clarity to the issue before us.

S. 1980 is a bill to require that the producers of syndicated television programming obtain and convey to broadcasters the performance rights to the copyrighted music contained in television shows when they sell all the other rights to the broadcasters. Broadcasters argue that the present blanket license is unfair and unworkable because once they have purchased the rights to a show, the music performance rights societies have them over the barrel. These societies know that the broadcasters have already paid a lot of money for the television shows and that they are worthless without the performance rights to the music. Songwriters and composers argue that the present system is fair and that several Federal courts have reviewed the system and determined that it is legal and reasonable. They argue that there are alternatives to the blanket license system available to the broadcasters and that the proposed legislation will result in the creators and copyright holders of television music being unable to obtain just compensation for their works.

We are here today to determine which of these arguments is correct. Mr. Chairman, thank you once again for bringing before us these experts in this area. You always strive to allow all interested parties to testify and I congratulate you for that. I look forward to listening to and reading the testimony.

PREPARED STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Few bills in recent years have presented me with greater cause for reflection and careful consideration and reconsideration of the implications of enactment. Both the broadcasters in favor of S. 1980 and the creative artists and music publishers in opposition have presented thoughtful and persuasive cases. At length, however, my deep personal confidence in the ability of the free market to allocate equitably and fairly products, in this case creative intellectual properties, has suggested the ideal standard to measure the merits of this music licensing legislation.

As this hearing proceeds, it is my intention to apply the free market standard to the existing system for conveyance of music performance rights. This will entail an examination of three basic aspects of the current system. First, are the fees for music performance rights currently established by free negotiations? It is my current understanding that those negotiations are entirely open and unfettered. In fact, there are four different market mechanisms for this transfer of rights: blanket licensing, per program licensing, direct licensing, and source licensing. One of my primary reservations about S. 1980 is that it would restrict this free and open system to one means of conveyance rights, namely the source license.

I understand that some broadcasters feel that the existence of a blanket license could effectively exclude the other three means of conveyance, but that is only a danger if songwriters refuse to consider reasonable offers for a direct license from a broadcaster or a source license from a TV producer. Moreover, ASCAP according to my understanding, is required to grant per program licenses. In the absence of clear evidence that composers would refuse to accept any offer outside a blanket license, it seems that the Federal Government ought to proceed carefully before restricting the parties' choice of alternative methods of licensing. If the parties have negotiated freely in the past, the Government has little justification for intervention.

A second avenue of inquiry ought to examine whether the current system rewards a composer according to the success of his music in the marketplace. Under the blanket license system, which S. 1980 would preclude, the composer of theme song that contributes to the success of a popular syndicated show is compensated according to the frequency his music is used. Conversely, a composer whose music was part of a show that never gets on the air is not compensated. This is an effective market test of music. Creativity is rewarded according to its merits. A system that would mandate source licensing, on the other hand, would make a TV producer the sole arbiter of value. The producer would decide on the composer's one-time fee before either party to the contract had any notion about how the market, the American listening public, would receive the work. In other words, there might be little assurance that a popular composer would be rewarded more than a composer whose music flunks the market test. It seems that there is value in leaving the selection of music and the rewarding of artists to a market system which makes every listening American a part of the music selection process.

Finally, we ought to examine whether songwriters are free to join any of the three copyright rights organizations, BMI, ASCAP, or SESAC. If composers are free to join or refrain from joining those organizations, they are each voluntarily choosing this form of compensation. In other words, they too wish to subject themselves

to the rigors and rewards of a market system. If that is the case, then the Federal Government ought to be very cautious about foreclosing that choice.

One further point, although blanket licenses may have some drawbacks, they are subject to court review for fairness. This, in addition to the availability of options other than these licenses, tends to add a further careful inquiry which Congress ought to undertake before venturing to change a system which has operated successfully to reward and stimulate creativity for 40 years.

With this market standard in mind, I look forward to examining S. 1980 with the witnesses today.

Senator MATHIAS. Senator Gore.

STATEMENTS OF HON. ALBERT GORE, JR., A U.S. SENATOR FROM THE STATE OF TENNESSEE, AND HON. FREDERICK C. BOUCHER, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Senator GORE. Mr. Chairman, thank you very much.

I have a rather lengthy prepared statement which has been submitted to the subcommittee. I appreciate your earlier statement that it will be included in the record.

I have a shorter summary statement that has been provided to you, but I am not going to use either one of them because, in the interest of time, I would like to simply summarize what I believe is at stake here.

I am here to testify as strongly as I possibly can against H.R. 3521 and S. 1980, and in favor of the current blanket license system which has worked so well for 70 years in this country.

Mr. Chairman, there is one simple fact that lies at the heart of this issue. If each individual composer and songwriter had to individually keep track of when his or her music was played, how often it was played, and by whom it was played, that individual songwriter or composer would find that task absolutely impossible. It was in recognition of that difficulty that the blanket license system was created.

In addition, because of the nature of this product, it is extremely difficult, if not impossible, to ascertain at the moment a song is heard for the first time how many times that song is likely to be performed. How enduring will its popularity be? How long will it capture the imagination of the public? In short, how much is it worth? These facts can only be ascertained over a lengthy period of time. The principle embodied in the blanket license system is that when music is played on a continuous basis, those responsible for creating the music should be compensated on a continuing basis. This is because the number of times music is played in the best determinant of its value.

These principles are very simple. They represent common sense. The system is working. It should not be changed.

Now, Mr. Chairman, we who believe strongly in favor of the current system are willing to live or die on the basis of the merits of this argument. We believe that the facts are clearly on our side. We believe that history and experience clearly show that not only does this system work, but that if it were destroyed and eliminated, we would lose something very precious in America, and that is the incentive for songwriters and composers to continue creating music. Music, after all, is one of America's most important exports, Mr. Chairman.

If you turn on the radio anywhere in the world, you will not have to wait very long before you hear American music. The odds are that an American song will be playing when you first turn on the radio.

This is because we have a dynamic system for creating music here in the United States. Our commitment to individual freedom unlocks a higher share of the human potential for creativity. And beyond that, we have had the wisdom to compensate fairly through the blanket license system those Americans who get into the business of writing songs and creating music. "If it ain't broke, don't fix it." That is a saying that has become a cliché, but I have never seen a case where it applies more clearly.

You will hear many other witnesses who will elaborate on the point that I have made here. One of them will testify just after Congressman Boucher, my friend and former colleague who normally has excellent judgment. This is the Register of Copyrights who testified earlier on the House side. Before he testified, people on both sides of this dispute were very curious as to what his position was. He stayed out of these frays, and only expresses an opinion when called upon by committees of Congress to give an opinion. However, when called upon to testify he said that the blanket license which has existed for 70 years, and I am quoting now, "has been subjected to the most intensive judicial scrutiny for its reasonableness and competitive effect, and has been found to be a practical necessity."

Now, Mr. Chairman, that really summarizes the case.

This issue has been fought in the courts all the way up to the top. The merits have been bandied about, back and forth, for a long time. Why does the attempt to do away with the blanket license keep coming back? Simply because some people have the misconception that music is like air or water. That it is just free. You turn on the TV or radio and it is there, so why should anybody have to pay for it?

Mr. Chairman, you know, and members of this committee know, that intellectual and creative property is nevertheless property. And we must keep a sound practical system for compensating the creators and owners of that intellectual property.

As a result, I urge you to act unfavorably on S. 1980.

Thank you, Mr. Chairman.

[Prepared statement of Senator Gore follows:]

PREPARED STATEMENT OF SENATOR ALBERT GORE, JR.

Mr. Chairman, distinguished members of the Committee, I want to thank you for providing me the opportunity to testify before you today on S. 1980.

This bill is of great concern to the creative community in Nashville and throughout the state of Tennessee. My office has received hundreds of phone calls and letters in opposition to this legislation from constituents who are songwriters and composers. In responding, I have given my assurance that this Committee will give S. 1980 very careful and thorough consideration. The witness list for the hearings today is impressive, and I am sure will provide an excellent beginning for the careful consideration which must be given the fundamental change in our system of copyright which this legislation proposes.

Our long-established system of encouraging and rewarding music creativity is facing a threat. The threat is posed by S.1980 which was introduced last year to revise our fundamental copyright law as it applies to music on syndicated television programs.

To understand fully the danger to our country's music creativity posed by this legislative proposal, it is first necessary to understand how the present system of licensing copyrighted music for local television works.

I. The Status Quo

When music is obtained for the sound track of a television show or movie which is later syndicated to local stations, our copyright law separates recording rights from rights of public performances. The "recording rights", or "synchronization rights," must be acquired from its creators by the show's producer in order to record and integrate that music into the show. The "public performance rights" must be acquired by the local TV station in order to perform that music over the air.

Initially, important TV shows are produced for the three major television networks. From the creators of the copyrighted music used in each show the show's producer acquires the music synchronization rights, and the network obtains the music performance rights. When that show, such as "M*A*S*H" or "Kojak", is later syndicated for broadcasting as an off-network program to local TV stations, both independents and network affiliates must acquire the non-music rights to the show from the producer or syndicator, and the performance rights to the music in that show from its creators.

TV stations are free to choose any one of several methods of acquiring those performance rights for the numerous musical works they broadcast every year. Almost all TV stations have thus far always opted to periodically obtain "blanket licenses" from the three performance rights organizations: ASCAP, BMI and SESAC. These organizations represent composers, lyricists and publishers of the majority of American music, as well as the works of almost all foreign creators and publishers. Composers are under no obligation to belong to any one of these organizations; however, nearly all composers do belong and license their songs through ASCAP, BMI or SESAC. The attributes of the blanket license are the same for BMI and SESAC. (ASCAP is sometimes used in this discussion for illustrative purposes.)

This blanket license system was devised more than 70 years ago in negotiations between music creators and music users. It is used by

our national TV and radio networks; local TV and radio stations, and virtually all other music users who perform publicly in the United States.

In exchange for a single agreed-upon payment based on that station's net revenues, a blanket license provides the local TV station with the right to unlimited use of all music in the ASCAP, BMI, or SESAC repertory. The TV show can be syndicated or locally produced and there are no premiums for particularly popular works. It is the right of access that is valuable. The TV station is paying for the unlimited right to use any music it may decide to broadcast; the nature and extent of which is not known in advance and much of which may not even exist at the beginning of the license term. The blanket license eliminates the need to obtain a limited license to cover only the particular music actually performed on any one of its local programs. Limited licenses of that kind are cumbersome to obtain, inconvenient to administer, unreliable and expensive compared to the blanket license.

From its pool of blanket license fees, the performing rights organization then pays each composer, lyric writer and publisher a portion on the basis of the relative number of times their work is broadcast and featured. This is reflected by a scientifically designed random sample of local TV performances which was worked out in conjunction with the Census Bureau. The creators thus receive "continuing payment for continuing use," which is the basic incentive for all musical, as well as literary, creativity. This principal is at the heart of all modern copyright laws.

In addition to convenience, the blanket license encourages the use of high quality copyrighted music in ample quantities on syndicated television shows. The syndicator of a show pays only the synchronization fee; he does not publicly perform the music and thus need not pay for performance rights. The TV station pays nothing more for high quality music beyond the standard license fee. The individual composer knows that his royalties will increase if his music is performed frequently; and therefore, has no reluctance about writing for network TV shows or movies which will possibly later go into syndication.

The system is under careful scrutiny to assure TV music users reasonable treatment. The fee for the blanket license is periodically negotiated between ASCAP, representing this country's individual music creators, and the All Industry Television Station Music Licensing Committee, representing nearly all the TV station owners in the country. If ASCAP's negotiations do not result in agreement, the user may go to court and ASCAP must prove the reasonableness of its fee proposal.

In addition, under federal consent decree, ASCAP has accepted an obligation to license all comers. It cannot refuse to license to any prospective licensee. Nor can it prevent a TV station owner from dealing directly with creators if he prefers.

Three other types of music performance right licenses are freely available to all local TV stations, as the courts have recently observed (*Buffalo Broadcasting Co. v. ASCAP and BMI*, 744 F. 2d 917 2nd Cir. 1984, cert. denied, 105 Sup. Ct. 1181 1985):

(i) a "per program license," by which ASCAP conveys on demand the same all-encompassing rights as in a blanket license but negotiates a fee, also subject to court review for reasonableness, based on a percentage of the net revenues derived from only those programs that carry ASCAP works, instead of the net revenues from all local programs;

(ii) a "direct license" between the creators and the TV station;

(iii) a "source license," under which the syndicated show's producer obtains the music performance rights for the TV station. (The trial record in the recent Buffalo Broadcasting case revealed that no local TV station had ever made a serious attempt to obtain such a license by actually offering to pay for it; some stations had asked for free licenses from producers.)

Despite this wide choice, local broadcasters have found it inexpensive, efficient and convenient to hold blanket licenses negotiated on an industry-wide basis. Mr. Edward Fritts, President of the National Association, testified before the House Judiciary Committee's Subcommittee on Administration of Courts, Civil Liberties and Justice in September 1985, in recommending for cable TV the same kind of blanket license process used in the ASCAP-All Industry Committee bargaining sessions for radio and TV:

"This process affords two large entities, with knowledge and experience in the field, to negotiate a price that correctly reflects the value of the works in the marketplace. There is no disproportionate size or wealth advantage that one side possesses over the other; quite to the contrary, there is equality of bargaining positions."

II. THE PROPOSED LEGISLATION

H.R. 3521/S.1980 would alter this status quo by shifting the obligation to acquire music performance rights away from the TV station that performs that music and onto the program producer-syndicator. The producer would thus be required to obtain both the right to record and the right to perform publicly. As a result, these two separate rights would be merged into one in most cases eliminating, the creator's separate payment for public performance.

In short, the bill would mandate source licensing as the only way a property owner could lawfully license his own property; all other methods of conveying to local TV stations these music performance rights in syndicated shows, including the traditional blanket license, would be eliminated.

Both proponents and opponents of the legislation agree that its overall economic effect will be a net reduction in the total amount of money paid by the local television industry for copyrighted music. According to the proponents of this legislation, these extra funds (most of the \$60 million per year now paid to the performing rights organizations for blanket licenses) will be used by the station owners to increase public affairs programming. Of course there can be no assurances that this will take place.

The individual composer would not be negotiating with the local TV broadcasters. At the present time ASCAP now negotiates on his behalf. ASCAP was established in 1914 to give copyright owners the ability to bargain meaningfully and to curb infringements effectively. However, with the new legislation, the composer would no longer be allowed to license through the ASCAP clearing house and would be prohibited by National Labor Relations Bureau rulings from forming a union with his fellow composers. Instead, the composer would be negotiating with a potential show's producer/syndicator. The reasonableness of the fee would no longer be protected by judicial review. Thus, the "equality of bargaining position" praised by knowledgeable observers of the current system would no longer exist.

Less than 3% of all shows produced actually succeed. This is significant to the producer/syndicator. He may never recoup any monies he expends for music in his high risk, deficit-financed business. When he is asked by the composer to pay more for the performance rights than the customary sum he has paid in the past for

the recording rights, he will turn to the available alternatives. These would include inexpensive music, less music in regard to quantity, and music in the public domain.

On behalf of the well-known songwriter, the producer may try to insert a clause in his agreement with the TV station providing more money for the songwriter for every performance. Since the TV station is offered a wide choice of syndicated shows and needs very few, they could threaten to reject the show unless the music performance rights were delivered free. The right of continuing payment for continuing performance will disappear.

Any broadcaster can bargain for source licensing under the present status quo as determined by the courts. However, he could drive a far sharper bargain if the law required all TV stations, creators and syndicators to accept source licensing only.

III. THE CONSEQUENCES OF THE PROPOSED LEGISLATION

This bill raises three fundamental questions for the consideration of every Member of Congress.

1. Why should Congress destroy a free market system that has worked well for so long?

Enactment of this legislation would drastically alter the system by which creators of music in television have been compensated in this country for four decades. This system was deliberately sought, created and renewed by both composers and broadcasters for its efficiency, economy and equity to all. It has been successfully utilized all over the world.

Moreover, all existing long-term contracts covering the large number of TV shows now in inventory allocate the cost of music performance rights under the current blanket license. These contracts simply require the TV station owner who performs that music to purchase the performing rights from the music's creators. Hundreds of millions of dollars are involved in these contracts. But this legislation purports to set aside, one year after its effective date, all of these contracts forcing the parties to revise them within the narrow bargaining constraints mandated by the bill. The contracts would have to obtain and pay for music performance rights no longer covered by blanket licenses, creating economic and legal chaos in the music and TV industry.

2. Why should Congress heed complaints already found invalid by the courts?

The proponents of this legislation have attempted to justify its necessity by making overlapping assertions rejected by the courts on full records as recently as 1984. Each practice, if alleged on the basis of new and different facts, could be pursued by the broadcasters in court without new legislation, and if proved, could be halted by the court. A case involving the reasonableness of the current blanket and per program license fees for music on local TV is pending before the U.S. District Court for the Southern District of New York.

Broadcasters are asking Congress to mandate source licensing after the court recently found that broadcasters were already free to seek source licensing but had chosen not to do so except to seek free licenses.

If local TV broadcasters want a source license, a lower blanket license rate, a different rate formula, or direct negotiations with composers, they already have a legal right to bargain for them in the marketplace. The courts will enforce this right.

The proponents of this legislation state that free marketplace negotiations have resulted in excessive compensation for music creators. However, the effective license rate of ASCAP's blanket licenses has steadily declined over the past four decades to little more than a penny out of every dollar of net TV station revenue; 1.15% today compared to 2.5% in 1949. Moreover, it has been estimated that the average professional composer earns only \$5,000 to \$7,500 a year from writing music, and that less than a third of that comes from the licensing of TV performance rights. This bill would leave creators with less bargaining power, lower royalties, and fewer opportunities to have their works performed. Their income and incentive to create as well as the number of people in that profession will all dwindle.

Meanwhile, the President of the Television Bureau of Advertising noted in December 1985 that TV, particularly local TV, was doing well "compared with all American business." Three-fourths of the approximately 800 local TV stations are owned by 160 media conglomerates operating 2 to 12 stations each and dominating all major metropolitan areas. Within the last year, local TV stations "were being bought and sold like the hot commodities they have become" because of their "considerable profits ... large cash flows ... minimal capital requirements and ... minimal competition," New York Times, (December 18, 1985).

If \$60 million or \$100 million or \$160 million is not a reasonable fee for the contribution music makes to a \$12 billion gross, let the courts consider all the evidence and set a fairer fee. However, if Congress eliminates this fee entirely by restricting and narrowing the market it will be an unwarranted and unjust blow to America's composers.

After careful consideration, I am confident that the Committee will determine that the sweeping and fundamental change in our system of copyright proposed by S. 1980 is unwise and unnecessary. Again, I want to thank the Chairman and the Committee for the opportunity to testify.

Senator MATHIAS. Thank you very much, Senator Gore.

Have you got time to stay?

Senator GORE. Mr. Chairman, I am at the disposal of the committee. I will have to leave in about 10 minutes, but I will be delighted to rework my schedule if that will be of—

Senator MATHIAS. Well, it might be useful if you could just stay long enough for Congressman Boucher's statement.

Senator GORE. Be glad to.

STATEMENT OF CONGRESSMAN BOUCHER

Mr. BOUCHER. Thank you very much, Mr. Chairman.

I appreciate the opportunity to appear before your subcommittee this morning, and I am particularly honored to be appearing with my good friend from Tennessee, Senator Gore, with whom I almost always agree. Today, however, is an exception to that rule.

I have, as you indicated, introduced in the House H.R. 3521, which is identical legislation to S. 1980. And I am pleased to be joined in the House in the cosponsorship of that measure by more than 130 members.

Mr. Chairman, the current practice by which local television stations acquire the right to air the music on syndicated television programming soundtracks is an anachronism.

Today, for local television stations to acquire the right to air "M*A*S*H" or "I Love Lucy," they have to go through a very contorted procedure. They obtain from the producer all of the rights to air the television work except for one, and that is the right to air the music on the soundtrack.

To get that right, they have to go to ASCAP and BMI, and they have to pay a blanket license fee which is equal to about 2 percent of their total station revenue. For the payment of that fee, they get the right to air not just the particular music that is on the soundtracks of the programs they are really going to air, but the right to air some 4 million compositions; the entire inventory of ASCAP and BMI.

That system prices the music at a value that is clearly disproportionate to the contribution that the music provides to the total overall work.

Now, there was a time, Mr. Chairman, when the blanket license for television made sense. In the early days of television, most of the nonnetwork programming was broadcast live. You simply had a band or some other kind of musical group sitting on the stage. The band would play item after item. There really was no way to know what music was going to be broadcast until the broadcast actually occurred. In that kind of structure the only way to clear the broadcast rights was to obtain a blanket license.

In that respect, the early days of television very closely resembled the condition of many local radio stations today where literally hundreds of titles are aired daily, and the only way to obtain the clearance for that is through the acquisition of a blanket license.

But over the years the condition and nature and character of television has changed greatly. Today, most of the nonnetwork time is not composed of locally produced programs that involve countless musical titles. Most of the nonnetwork programming today is syndicated television programming. In syndicated TV programming, we are talking about a relatively few number of music titles that can be readily identified, bargained for, and purchased in advance.

In that respect, the condition of local television today very closely resembles the motion picture industry. In that industry, we have source licensing for the music. When a local movie theater owner obtains the right to screen a motion picture from a producer, he gets in one bundle all of the rights that he has to have to screen that work. He gets the music performance rights included in the conveyance of rights. What we are seeking for syndicated television programming is exactly the same kind of structure that has worked so well for motion pictures.

I think if you ask the questions, Mr. Chairman, of the witnesses who appear in opposition today, they will tell you that in the motion picture industry they receive adequate compensation for the music that they have created. That has been the testimony in a series of four cases, and I think that will be testimony here today. And I would point out that that system has worked well, not just for the composers and the lyricists themselves, but also for the American viewing public, producing such memorable scores as the theme from *The Sting*, from *Star Wars*, and from *Butch Cassidy and the Sundance Kid*.

The same system that has worked so well for motion pictures can work exceedingly well for television. That is the purpose of our legislation.

In view of the success of source licensing in the motion picture industry, I think we have to ask the opponents of this legislation what makes television so special that a blanket license is required?

Now, those who will appear in opposition today are going to raise several arguments against the bill. Let me just take this opportunity, if I may, to rebut them.

First of all, you are probably going to hear that the more than 60,000 members of ASCAP and BMI would be injured if S. 1980 and H.R. 3521 are adopted. That argument simply does not square with the facts. It should be understood that, under both of these pieces of legislation, TV stations will pay for the music that they obtain. They are not asking that the music be given to them for free. They are obviously going to pay to the producer, who licenses the syndicated programs, more with the music right included than in its absence.

Second, it should be pointed out that 90 percent of all syndicated TV music copyrights are owned by the very studios that license all of the other rights to TV stations today. Ninety percent of those copyrights are owned by the producers, not by the songwriters and lyricists themselves. The compensation of the songwriters, the composers and lyricists is determined by their contract with the producer. And as a part of the negotiation process for that contract, the right to receive continuing payments for the continuing airing of their works can be protected. Songwriters could receive, under our legislation, continuing payments in the form of residuals just the way that scriptwriters and directors do today.

One of the principal arguments that you are going to hear in opposition to our bill, and indeed my good friend from Tennessee has raised the argument already, is that under this legislation there would be a one-time payment to the composer and to the lyricist, and that that one-time payment structure would provide a disincentive to creativity. That simply is not the case.

Under the contractual arrangements with the producers, you can have residuals just the way that directors get them, just the way that scriptwriters get them. Under this legislation I am confident that you would find songwriters getting them as well.

And finally, Mr. Chairman, I would emphasize that of the \$85 million that was paid in 1985 by local TV stations to ASCAP and BMI as blanket license fees, fully \$40 million of that amount, almost one-half, went to the very production companies that were licensing all of the other rights to air the work. They all own publishing subsidiaries, and their publishing subsidiaries receive \$40 million out of that \$85 million blanket license fee. The remainder, \$45 million, was distributed to the composers and the songwriters who create and write music for syndicated television programs.

But that is an astonishingly small percentage of the overall membership of ASCAP and BMI. Let me just tell you what those percentages are.

Of the \$45 million that songwriters receive, 95 percent of that amount went to only 6 percent of the members of ASCAP and BMI. The remaining 5 percent went only to an additional 9 percent of

the members of ASCAP and BMI. Fully 85 percent of ASCAP and BMI members received nothing, not a penny from the distribution of the blanket license.

We are talking about probably less than 1,000 songwriters and lyricists and composers who received any distribution from this blanket license.

Mr. Chairman, I know my time has expired. Let me simply say in conclusion that under this legislation television stations would pay for the music that they obtain. They would have a practice that is very similar to the practice that exists so well and has worked so well in the motion picture industry today, and because good music would be rewarded, I would suggest, Mr. Chairman, that the television viewing public will be the winners.

I thank you very much for this opportunity to appear today.

[Congressman Boucher's submissions for the record follow:]

PREPARED STATEMENT OF CONGRESSMAN RICK BOUCHER

Mr. Chairman, thank you inviting me to testify before your subcommittee on S. 1980, legislation to reform the licensing of music soundtracks on syndicated television programs.

I have introduced similar legislation, H.R. 3521, in the House where the bill enjoys the cosponsorship of more than 130 of my colleagues.

Under current practice, when a local television station purchases a syndicated program such as M*A*S*H or I Love Lucy, all of the licenses necessary to air the show are bargained for, purchased and conveyed to the television station except for one--the right to broadcast the music on the soundtrack. To receive that right, television stations must obtain a blanket license from ASCAP and BMI, for which they pay a fee equal to two percent of total station revenue and which gives them the right to air not just the music on the particular shows they have purchased but approximately 4 million titles licensed by ASCAP and BMI.

There was a time in the early days of television when the blanket license made sense. In those days there was no syndicated programming. Most non-network programming was locally produced and broadcast live. It consisted of various musical groups sitting on a stage and playing song after song. There was no way of knowing what music would be broadcast until the broadcast actually occurred. Obviously, the station could not bargain for the right to air each song individually. The only practical means of clearing the broadcast right was through a blanket license.

In that respect, the early days of television closely resembled the current situation of many radio stations where blanket licenses are necessary to permit the broadcast of hundreds of titles daily.

But over the years the television industry has dramatically changed. Today, most non-network air time is devoted to syndicated programming, the soundtrack for which contains a relatively small number of music titles, readily identifiable in advance.

The structure of today's syndicated television programming industry is quite similar to the motion picture industry, and we are seeking through the enactment of H.R. 3521 to establish for television the same music licensing system that has worked so well for motion pictures.

When a motion picture producer licenses a movie to a local theater, he transfers to the theater all the rights necessary to screen the work, including the music soundtrack rights. The motion picture theater owner doesn't need to obtain a blanket license for the music because music can be clearly identified, bargained for and purchased in advance.

This system has worked exceedingly well for motion pictures and has produced such memorable scores as the theme from The Sting, Star Wars, and Butch Cassidy and the Sundance Kid.

The same music licensing arrangement can work just as well for television.

Under today's practice, television stations must pay dearly when they acquire all of the broadcast rights less the music rights. Then they must pay dearly again when they acquire that right.

Today's practice is an anachronism. In view of the inequity it creates and the outstanding success of the motion picture industry practice of conveying the music right along with all other rights, we must ask why the opponents of this legislation believe that syndicated programming is so different from motion pictures that a blanket license is required.

Those in opposition say that legislation to require that music rights be bargained for and paid for along with all other rights would injure the 60,000 composers and lyricists who receive royalties from ASCAP and BMI.

This suggestion simply does not square with the facts.

First, it should be understood that under H.R. 3521 television stations will pay for the music rights. Their payments to producers will be greater with the music right added than in its absence.

Second, it should be noted that 90 percent of all syndicated television music copyrights are owned by the studio's which produce the programs, not by the composers and lyricists themselves. The compensation of songwriters is determined by their employment contracts with the studios. They will receive residuals just as scriptwriters and actors do today. Through negotiations with the studios their right to receive continuing payments for the continuous use of their works can be fully protected.

Third, I would emphasize that of the \$85 million in blanket license fees paid to ASCAP and BMI for syndicated television programming in 1985, fully \$40 million, almost one-half, was paid to the music publishing subsidiaries of the television production studios. The remainder was distributed only to those songwriters who have written music for syndicated programs, and that's an astonishingly small number of the 60,000 members of ASCAP and BMI.

In fact, 95 percent of that \$40 million goes to only 6 percent of the composers. The remaining 5 percent goes to an additional 9 percent of the composers, and 85 percent of the composers and lyricists who are members of ASCAP and BMI receive not a penny of the royalties collected under the blanket license.

The passage of H.R. 3521 is clearly in the interest of those 85 percent of ASCAP and BMI members who are foreclosed from receiving royalties under the current practice. For the first time the incentive would exist for local television stations to hire local songwriters for locally produced programming. Under the blanket license those opportunities are rare. Consider the present day reaction of a typical television station general manager when his program director comes to him and suggests hiring a local composer to create music for a locally oriented documentary.

The general manager already believes, justifiably, that he is paying too much for music broadcast rights. He has the right to air 4 million titles, and he will almost always say to his program director that surely one of those works, which can be used at no extra cost, would be appropriate.

Under H.R. 3521, the television station would pay only for the music it uses. In the absence of the blanket license, new opportunities would be presented for the vast majority of American songwriters who presently have no opportunity to participate in this exclusive market.

There may be some losers under H.R. 3521. Since a more competitive market for television music will be created, quality works will command a greater compensation than they do today, and mediocre works will command less.

Studios will lose the arbitrary 50 percent they now receive as the publishers' share of ASCAP and BMI distributions, and the ASCAP and BMI staffs may shrink a bit.

But because good music will be rewarded, the American television viewing public will be the winners.

†

A Transamerica Company

New York, New York
G12 579-3000

PX 1F-2 (p. 3)

July 27, 1981

Storer Broadcasting Company

Miami Beach Office

RECEIVED JUL 29 1981

A. A. CHURCH

Mr. Abiah A. Church
Vice President
Storer Broadcasting Company
1177 Kane Concourse
Miami Beach, Florida 33154

RE: MUSIC PERFORMANCE RIGHTS FEES

Dear Mr. Church:

We acknowledge receipt of your letter dated July 2, 1981 requesting that United Artists Television Inc. change its current form of licensing to include a warranty stating that all monies owed to music performance rights societies have been satisfied by the distributor.

United Artists is unable at this time and in the foreseeable future to change the framework and nature of the licensing agreements for our motion pictures. After exploring the equities we have determined that the proposed modification would be violative of the policies for which "performing rights" were originally instituted and would deny these organizations their rightful share of the gross receipts of the party fully benefitting from the use of the musical property.

We appreciate your inquiry, however it would be both undesirable and inappropriate for United Artists to adopt your proposed modification. Unless there are significant changes in the structuring and policies of performing rights agencies, we do hope this issue will remain closed for any current as well as all future negotiations with Storer.

Very truly yours,

David Cornell
David Cornell

DC:maf

cc A. Sporer
M. Robinson
D. Lebel



EDWARD A. HOFFMAN
VICE PRESIDENT
TELEVISION LEGAL AFFAIRS

PX 1G-2 (p. 7)

001 - 8 1001

J. A. STABILE

October 26, 1981

James A. Stabile, Esq.
Associate General Counsel
Metromedia, Inc.
5746 Sunset Boulevard
Los Angeles, California 90028

Dear Jim:

It is conceivable, and it did occur to me shortly after our brief telephone conversation, that you did not basically understand my premise. What I am trying to say in the most succinct manner I can express it is that Fox is not interested in changing the manner in which we are currently doing business with our various licensees. It seems to me that it is your feeling that you want to change the business. Since we are continually doing business and have been doing so for a number of years, we have tried to be courteous in alerting you to the fact that there were several issues to be dealt with that were not quite so cavalierly handled as to simply tell you "NO!" If you are as serious as you claim, and if you want to alter the current manner in which we do business, then my suggestion is that it is your responsibility to advise us in what manner you would like to do this.

At the risk of being redundant, we have told you in the past, as we have told every other licensee who is asking this simultaneously, that we would not even consider clearing music at the source by simply adding a provision to our contracts. Our response was intended to suggest as peripherally as we could some of the issues which exist. We really aren't in a position to answer the questions that you suggest, since it is you who are seeking to alter the course of business. If you wish us to consider the matter, please submit a proposal and I will see that your proposal is considered by those corporate executives whose job it is to make this decision.

Very truly yours,

EDWARD A. HOFFMAN

EAH:bl

MW 06/27

PX 87 C



WARNER COMMUNICATIONS INC.



New York 13, 1961

Alfred L. Schwartz, Esq.
 Merrimack, Inc.
 1 Brown Plaza
 Secaucus, N. J. 07094

Dear Al:

Your letter of November 10, 1961 is a welcome reminder to do what I had been, with all good intentions, planning on doing for a few weeks, namely, asking you and Arnold to join me again for lunch so that we can resume discussion of the question you raised.

As I told you I would, I discussed the question with my principals, and, as I predicted, we are left with a great many questions which perhaps you can answer. The questions go fundamentally to the economic benefit, if any, to be derived by Warner if it undertook to clear rights as you suggest. You may already have some ideas on the score or you may want to give it some thought.

Please call me at your first convenience so that we can set up a date for another meeting.

Kindest regards.

Sincerely,

Bernard R. Soblin
 Bernard R. Soblin

BS:CO

PX 1A-1 (p. 3)

David A. Dreilinger
Deputy General Counsel



September 30, 1981

Mr. Arnold L. Wadler
Matronecia, Inc.
1 Harmon Plaza
Secaucus, New Jersey 07094

Re: Music Performance Rights

Gentlemen:

Reference is made to your letter of April 14, 1981, with respect to music performance rights fees. As you are aware, music performance rights licenses are included in the rights package for theatrical distribution of motion pictures pursuant to a court decision mandating such inclusion. However, it is not current industry practice for music performing rights licenses to be included in connection with the television exhibition of motion pictures.

Accordingly, we do not believe it feasible for us to clear music performance rights licenses for television exhibition at the program supplier level.

If you have any questions, please feel free to contact me.

Sincerely,

DAD/mc

cc: Mr. Zaleski

CON

PX 1B-1 (p. 7)

METRO-GOLDWYN-MAYER FILM CO. 3332 W. Washington Blvd. Culver City, California 90231 (213) 838-3000

July 17, 1981

Mr. Abiah A. Church
Vice President, General Counsel
Storer Broadcasting Company
1177 Kane Concourse
Miami Beach, FL 33154

Storer Broadcasting Company
Miami Beach Office

RECEIVED JUL 20 1981

A. A. CHURCH

Re: Music Performance Rights Fees

Dear Mr. Church:

Your letter of July 2, 1981 to Mr. Joseph C. Tirinato has been referred to me for response. We are not willing to comply with your proposal for altering the music warranty paragraph of the television syndication agreements between MGM and Storer.

The customary type of license which MGM receives from the music publishing companies is a license to synchronize the music on our motion picture soundtracks and to performance of such music in motion picture theatres only; the performance grant is always subject to clearance by television stations or networks of the performance rights from ASCAP or BMI. We have entered into innumerable licenses of this type for our many features and television programs over the years and these are the only kinds of licenses music publishers issue to us at the present time.

It would be virtually impossible for MGM to renegotiate its music licenses to include television performances, and in any event, the fee that MGM would have to pay to secure such a performance license covering television networks and stations (if we could get such rights) would be prohibitively high and could never be recouped even if the license fees charged to broadcasters like Storer were substantially increased. Further, it would be impossible for us to coordinate the securing of music performance licenses for television unless every television station licensed by us around the country agreed to increase the basic license fee paid to us to offset our expenditure in securing those rights for them. As you can imagine, this would be a mammoth task doomed to failure from the outset.

The kind of music warranty contained in our current television licenses is the only warranty which we are legally able to grant in view of our many existing music licenses as well as the form of music license which is customarily issued by music publishers. We, therefore, cannot agree to any change in our current music warranty clause nor are we willing to change the way we do business.

Very truly yours,

Anita R. Van Patten

Anita R. Van Patten
Attorney at Law

ARVP/12



Columbia Pictures Television
Distribution

PX 1C-7 (p. 12)

Marlynda Salas
Director of Syndication Sales
Administration

September 21, 1981

Mr. Ralph Webb
Program Manager
KWTX Broadcasting Co.
4320 Bosque Blvd.
Waco, TX 67610

Re: License Agreement No. 7679
"Goliath Awaits"

Dear Mr. Webb:

Enclosed please find a fully executed copy of the above referenced license agreement.

We regret that Columbia Pictures Television is unable to agree to your proposal that it obtain music performance licenses in connection with the instant license agreement.

Columbia Pictures Television has obtained all necessary music synchronization licenses for the program subject to this license agreement. In accordance with long-standing industry custom and practice, it is the responsibility of the station which exhibits the program to obtain the music performance licenses.

Thank you.

Sincerely,

Marlynda Salas

MS/jk

Enclosure

Senator MATHIAS. Thank you, Mr. Boucher

Senator GORE. Mr. Chairman, could I make just a couple of brief statements?

Senator MATHIAS. Let me just pose one question to you, and then I will be happy to hear anything you say.

Senator GORE. Sure.

Senator MATHIAS. But I am so interested. Here you two are neighbors, on each side of the ridge. [Laughter.]

Senator GORE. That is right.

Senator MATHIAS. So we do not have a regional issue here and, in fact, as I look around the room, it is obvious we do not have a regional issue here, but it is an issue that has stirred a lot of very strong feeling, a lot of emotion in the entertainment and in the broadcast industry.

And just the fact that we have got you two neighbors here provides an opportunity to ask what about the viewing public? I mean, after all, we have to think about the entertainers and the musicians and the broadcast industry itself. But the end product of this whole thing is the public, the viewers.

And what about the TV watching, music-loving people of Tennessee and Virginia, and I might even humbly add the people of Maryland, what is in this dispute for them? Where do they come out in the whole thing?

Senator GORE. Mr. Chairman, you have asked the key question. That really penetrates to the heart of the issue. Because the current system of blanket licensing is the only way to assure the incentive for creativity that serves the public and has served the public so well.

The American public benefits from having a continuing supply of quality music. Our American Nation benefits from the tremendous export earnings which come from the most robust music industry of any nation in the history of the world.

If this legislation passed, I do not believe it is an exaggeration to say that after a short period of time, the American music industry would be irreparably harmed, and the American listening public would be deprived of access to the creative product now available, and the American Nation would lose the export earnings which now come to this country every year.

If this legislation does not pass, television stations would still be selling for many times their annual earnings. They would still be one of the most profitable industries in the United States. But the music industry and the people of this country, more importantly, who enjoy American music and benefit from it, would be deprived of that music. That is really the central issue here.

Mr. BOUCHER. Mr. Chairman, let me respond, if I may.

First of all, I would suggest that those who say that there would be a damaging or injury to the quality of music if this legislation passes are being inaccurate. And I would point again to the very success of the source licensing system with regard to motion pictures.

Remember the themes from——

Senator MATHIAS. It might be presumptuous, but they are not necessarily inaccurate.

Mr. BOUCHER. Well, Mr. Chairman, I would suggest that their statement simply does not square with the facts. And it is a presumption which I would suggest is inaccurate.

Senator MATHIAS. And that is a little different.

Mr. BOUCHER. OK. I will accept that.

I think if you look at the success of the source licensing system with regard to motion pictures, you can clearly see that the source license itself does not diminish creativity.

We remember "The Sting," we remember "Star Wars," we remember "Butch Cassidy and the Sundance Kid," and indeed the themes from those motion pictures became hit records in and of themselves.

I would point to the condition of syndicated television programming. How many themes from syndicated TV programmings do you readily remember? How many of those became hit records? Very few.

I think it is apparent that the quality of music on the soundtracks of motion pictures today where source licensing exists is excellent. The quality of music on the soundtracks for syndicated TV programming is somewhat less than that quality. And so I would suggest there clearly would be no damaging of the quality if we had source licensing for syndicated TV programming.

Let me carry the argument one step further and suggest that we would create a new market for the many local composers today who are members of ASCAP and BMI, but who do not write music at all for syndicated TV programming. Consequently, they get no money whatever from the distribution of the blanket license fee. And that is 85 percent of their total members.

Many local TV stations today produce documentaries. There are many times, I would suggest, when the production manager for that TV station would like to hire a local composer to write the music for that documentary. But when he goes to the general manager of the TV station and he says, you know, I would like to pay Susan over here, who is a very good songwriter, a certain amount of money for creating the music for this documentary. The manager of the TV station's natural reaction is going to be, well, you know, I am paying 2 percent of my total station revenue today to acquire a blanket license that gives me the right to air 4 million titles. And surely, since I am paying so much for that, you, production manager, can find one of those 4 million titles that is adequate for your documentary. The result of that is that composers who are not part of that privileged 15 percent who receive money from the blanket license are foreclosed from the local market as well.

The local TV manager simply has no incentive to pay additional money to hire them. If this bill passes, TV stations would pay only for the music they use. That incentive would, in turn, be created, and local composers who are foreclosed from this privileged market today would have a chance to participate.

Senator GORE. Mr. Chairman, if I might respond briefly.

TV stations would pay only for that music that the individual composers found out that they use or that they specifically contracted to use under a source license. If they had programs that included music not contracted for under a source license, the composer might never find out about it and would never be compensated.

That illustrates the critical difference between the broadcasting industry and the movie industry.

You are talking about so many more possibilities for performance in broadcasting outlets around this country than in the movie industry. These two industries are very, very different.

Second, there is the opportunity for source licensing now in the broadcasting industry. It may be not as easy to negotiate, of course. I understand that. But all forms of these licenses are currently available. And the blanket license, Mr Chairman, is negotiated, and it is important to point out that I do not know where my colleague's figures come from, but the percentage this year is 1.15 percent of net revenue. That represents a continued decline over the past four decades. It was 2.5 percent back in 1949. Now, the performing rights organizations can testify for themselves on this point.

Senator MATHIAS. In your written statement, Senator Gore, you note that what that comes to in figures, and I think it is useful, that you are talking about a \$12 billion gross.

Senator DECONCINI. Mr. Chairman, would the Chairman yield?

The Senator from Tennessee just made reference to net point something percent of net.

Senator GORE. Right.

Senator DECONCINI. Is it not of gross revenues?

Mr. BOUCHER. Mr. Chairman, if I might simply add to that, I do not have the precise figures for both ASCAP and BMI. I think that subsequent testimony will confirm that, first of all, the blanket license is computed on gross revenues. And, second, that when you combine the charge for ASCAP with the charge for BMI, it amounts to something very close to 2 percent of the stations, gross revenue for the year.

My friend from Tennessee says that it is negotiated. It is not really negotiated. ASCAP and BMI decide what they are going to charge, and they essentially say to the local stations you can take this or leave it. They charge the stations the same percentage of their gross revenue without regard to the quantity of music a station uses. And the station frankly is in no position to counter that. If it is going to have any syndicated TV programming, it simply must pay that blanket license fee.

Let me respond to one other comment that my good friend from Tennessee made.

Senator DECONCINI. Mr. Chairman, would the Congressman hold up just a minute? Could I get an answer to that? Does the chairman know or is there someone here who knows whether or not it is a percentage of gross or net?

Senator GORE. I believe that I can—I believe the next panel will be able to respond to it. But I am informed that it is in fact net. It is a form of adjusted gross which works out to the same thing.

And if those pushing the legislation have felt that it was 2 percent of gross, then maybe they have been laboring under a misconception. But the next panel can certainly clear that up.

There is one other—

Senator MATHIAS. That is why I raised that point, and we will pursue that with other witnesses.

Senator DECONCINI. Thank you, Mr. Chairman.

Senator GORE. There is one other misconception, and that is that only relatively few songwriters benefit from the payments under the blanket license. There are thousands of songwriters in any given year, but that pool of songwriters who have music performed on television is not static. It is a constantly changing, ever-increasing pool of songwriters who, at various times in their careers, have music that is performed on television.

You have—one of your witnesses later on, Mike Post, who has music on right now, and nobody ever heard of him a few years ago—as a prominent songwriter. He just entered that business. It is a constantly changing cast of characters. And at any given time, any songwriter has the opportunity to benefit from this pool.

And, moreover, the performing rights organizations are under an obligation to license anyone, a very minimal requirement.

This system really works, Mr. Chairman, and should not be changed.

Mr. BOUCHER. Mr. Chairman, if I may very briefly respond to one point that Senator Gore made, both in his opening statement and just recently, and that is that the burden would somehow be on the songwriter to track down every time that his song is used. That simply is not the way it works.

The burden is on the person who produces syndicated television programming to clear all of the titles that are used on the program. In the absence of having done that, the local TV stations would clearly have a contractual remedy back against the producer for having breached its contract to include all of the rights in one bundle. And the songwriter obviously would find out if a syndicated TV programming aired on stations all across the country was using a song of his without having paid him for it.

So the remedy would be very available to the songwriter and the notice of the fact that the right had not been cleared would come to his attention quite readily.

Senator GORE. Well, Mr. Chairman, let me just tell you what the Register of Copyrights says, who does not have an interest in this. The Copyright Office believes that the present licensing system should not be changed unless the legislation also protects the composers of television music by mandating some kind of continued payment for the continued use of the work.

There is no protection at all if this legislation passes.

Senator MATHIAS. We are about to have the Register of Copyrights testify in person on that subject.

Senator DECONCINI. Mr. Chairman.

Senator MATHIAS. Senator DeConcini.

Senator DECONCINI. Would the chairman yield for a couple of questions, particularly to Senator Gore.

I appreciate your position, and I have a great sympathy towards the artistic value of the songwriters. And I do not want to see us make a mistake that is going to damage them and curtail or reduce their creativeness.

Two things trouble me. Maybe you have got some answers to them.

No. 1, the problem, as I see it, is that the cost of television stations has increased substantially. A lot of the increase has nothing to do with songwriters or you and me. It is a matter of the specula-

tive market value of these stations. They are sold for more than their ability to raise advertising revenue and their profitability. These increases do not have a whole lot to do with the creativeness of the artists that wrote the music.

So, now, they are witnessing a percentage increase in what they receive for an entirely different reason. Is it really fair for them to have a possible windfall increase when a cost that does not have anything to do with the cost that they bear has gone up?

Senator GORE. Well, let me respond in a couple of ways.

First of all, the percentage paid under the blanket licenses has continued to decline over the last four decades. It is much less today. It is almost 50 percent less today than it was.

Senator DECONCINI. What about the last 4 years?

Senator GORE. Well, it is negotiated every so often. And when it comes up for negotiation again, presumably this factor will be taken into account.

Second, I would not too hastily jump to the conclusion that the creativity of the composers and songwriters has had nothing to do with the increased popularity of certain television shows. Some of the hot new shows that are up near the top of the ratings may make more use of music than ever before in the past. There has been a lot of commentary about this. The TV Guide, for example, who you might think would side with the broadcasters on this question, has come out strongly in opposition to this bill. It notes that the new programs make even more use of music than ever before.

Look at a program like "Hill Street Blues" or "Miami Vice."

Senator DECONCINI. Well, I do not believe that they have nothing to do with the value and the goodness of the show, or in the attraction.

I am talking about the high cost of buying a television station and recouping that cost by raising advertising rates. That money goes into the net or gross from which performers get a cut. That is the link that I have a little trouble justifying. Not to mention that all of that is not part of the performance that makes good shows. Even lousy television stations sell for millions and millions of dollars today, far greater than what their rate of return would indicate. The excess value exists because of investor speculation in the industry.

Senator GORE. Well, it is a curious fact of life that in some cases as a business makes more and more and more profits, they also become more and more and more reluctant to pay for what they are using as a raw material.

I think it is a good development that these stations are becoming more profitable. It is one of the most prosperous industries we have had. And I think that is part of the reason why the percentage in the blanket license has steadily gone downward.

But for them to take the position that they want to do away with it altogether, it is just wrong.

Senator DECONCINI. Let me ask you another question.

Now, it is my understanding that the artists cannot and have not been recognized under the NLRB as a bargaining unit. That seems very unfair, especially if they should elect to become a bargaining unit.

If they were permitted to do that, would that not put them in a much stronger position, assuming they elected to do that? I am a strong believer in that principle. But would that not put them in a much better position to negotiate because then their organization could strike and withhold their product and their talent for a more favorable contract?

Senator GORE. Well, I think that is really a separate issue. I think that if they want it, they should have that right. But even if they had it, it would take a long, long time to evolve any system at all comparable to the one we now have that works so well. And to destroy this system without having anything in its place, and knowing that it would take many decades to rebuild what we already have, and it works so well, it seems to me it would be a very serious mistake in public policy.

Senator DECONCINI. Well, one of the troubles with the system that we have today is a result, as I understand it, of a lawsuit. The broadcasters lost, and it is under the consent decree of the court. Is that really what we are up to here? Should we permit a court to determine the equitableness of this fee? Is it not really the responsibility of the legislative body to come to this conclusion and maybe put into law what the court has done? Let us certainly not just leave it like it is. I think that is what generates the chairman to bring these hearings today.

Senator GORE. The parties negotiate. And if they cannot arrive at a settlement, then there is an opportunity for one side or the other to take it to court.

And again the central fact is that the current system works. If this legislation does not pass, as I dearly hope it will not, television stations will still be one of the most prosperous industries in America. And we will still have the creative incentives that currently exist.

If it does pass, then I would argue very strongly that not only would the music industry be irreparably damaged, not only would the public be deprived of this music, but over time the broadcasting industry would be damaged as well. Because it would lose access to this continuing supply of music.

Senator DECONCINI. Thank you, Mr. Chairman.

I do not quite agree with that last statement because I think that the market is going to bring forward talent. It is not going to dry up if we do not do anything or if we do do something here. The public is not going to stop producing. There is still going to be a need.

And I think my concern, and I will ask here for unanimous consent that my opening statement appear in the record at the beginning, is that these artists be rewarded fairly. And that is the problem that this Senator has. What is a fair recompense for that exceptional talent that these people provide to all of us in this country? And I want to listen to the other witnesses if I possibly can.

Thank you, Mr. Chairman, for having these very good witnesses.

Senator MATHIAS. Gentlemen, just let me pause for a moment to welcome Senator Kennedy. He is a new member of this subcommittee. We are going to give him a kind of a Baptist welcome, total immersion. [Laughter.]

Senator KENNEDY. As long as you bring me up on the other side.
[Laughter.]

I am sorry I did not have an opportunity to hear the witnesses, but look forward to reading their testimony.

I would like to submit a statement to be printed in the record.
Senator MATHIAS. Without objection.

[Statement of Senator Kennedy follows:]

PREPARED STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE
STATE OF MASSACHUSETTS

I welcome these hearings on legislation to change the way performance rights for copyrighted music in syndicated television programming is conducted. The bill before this subcommittee would radically depart from the current practice for music licensing by mandating one form of licensing, source licensing, in place of the four methods of licensing currently available.

The burden on those who would have the Congress legislate such a dramatic change in the way performance rights for music are licensed is very high. The current system, under which most performance rights for music in television programming are secured through blanket licenses obtained from performing rights societies, has worked very well. It protects the rights of composers, lyricists, and music publishers and provides performance rights to broadcasters at a fair price. It has been upheld by the courts. The rates charged by the performing rights societies are subject to judicial oversight. This system has produced an environment conducive to the creation of outstanding musical works. Congress should be very wary of interfering in the current system.

I look forward to the debate on this issue and the testimony of today's witnesses.

Senator MATHIAS. Just one last sort of in-house question, Mr. Boucher.

You are a member of the Judiciary Committee on the other side. You have an interest in a bill for agricultural chemical patents.

Mr. BOUCHER. That is correct, Mr. Chairman. I believe you are the chief sponsor of that legislation in this body.

Senator MATHIAS. That is right.

Now, we are going to have a pretty tough time getting any legislation out of the intellectual property side of Judiciary this year at best.

What kind of priorities ought we to establish? [Laughter.]

Mr. BOUCHER. Mr. Chairman, let me address that question with you privately at some future time, if I may. [Laughter.]

Senator MATHIAS. Thank you, gentlemen.

Before we start on questions, let me say that the administration has been unable to present testimony in person with respect to its views on S. 1980 this morning.

I am advised that there will be a written statement of the administration's position which will be available in the very near future and, without objection, that will be included in this part of the record.

[Statement of Mr. Quigg follows:]



**UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office**

Address: COMMISSIONER OF PATENTS AND TRADEMARKS
Washington, D.C. 20231

APR 9 1980

Honorable Charles McC. Mathias, Jr.
Chairman
Subcommittee on Patents, Copyrights
and Trademarks
Committee on the Judiciary
Washington, DC 20510

Dear Mr. Chairman:

Thank you for your letter inviting me to testify on S. 1980, the "source licensing" bill. I regret that due to unavoidable scheduling conflicts I am unable to appear before your Subcommittee at the April 9th hearing. However, I am submitting a statement for the record which sets forth the Administration's views on this legislation.

Sincerely,

A handwritten signature in dark ink, appearing to read "Donald J. Quigg".

Donald J. Quigg
Assistant Secretary and Commissioner

PREPARED STATEMENT OF DONALD J. QUIGG

Mr. Chairman and Members of the Subcommittee, it gives me great pleasure to present the Administration's views on S. 1980 the so called "source licensing" bill.

In the United States we enjoy the widest range of entertainment, cultural, and informational programming on our television channels of any country in the world. We enjoy the fruits of the efforts of our own creative authors, composers, directors and performers as well as those from other nations around the world. We often hear cries that the quality of television programming is poor. They may or may not be true, but that is largely irrelevant here. What we have is a system of privately owned television networks, stations and program producers who produce and broadcast what the public wants, supplemented to some extent by the Public Broadcasting System's non-profit programming. This system results in the presentation of all sorts of programming -- from the popular appeal of the "Wheel of Fortune" to specials like "Shogun" that draw wide critical acclaim. The heart of this system is the copyright law that provides the incentives to create this wide range of works by assuring to creators limited rights to receive remuneration for their efforts. The bundle of rights afforded by copyright includes the right to control the public performance of dramatic and musical works.

In the world of radio and television, broadcasting a program constitutes a public performance of a copyrighted work rendering the broadcaster liable to pay the copyright owner a royalty for the use of the protected work in a broadcast. The mechanisms by which broadcasters compensate copyright owners for this use of their creative product is the heart of the matter before you today.

There are many ways in which broadcasters can compensate authors and composers for the use of their works, and the method that is chosen may well represent a balance or an imbalance in the interests of both creators and users -- of authors, composers and producers on the one hand versus broadcasters on the other hand. Composers typically license the public performance of their works through performing rights societies, the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC (originally the Society of European Stage Authors and Composers). Today, we are not concerned with the interests of all creators, only the interests of composers, and on the other hand not all broadcasters -- not the major networks

-- only those independent stations who broadcast syndicated programming. But, even though we are only talking about small portions of both the creative community and broadcasters, we are talking about interests in very large sums of money. For example, in 1980, ASCAP estimates that composers, earned an estimated \$37 million in royalties paid by over 800 locally-owned stations whose gross income was about \$4.3 billion.

Our interest in this matter does not lie in the amount of money paid or the rates charged by ASCAP and BMI; those rates are set by negotiations between the performing rights societies and the broadcasters. In the case of ASCAP the rates are subject to review in an impartial forum -- the U.S. District Court for the Southern District of New York, in accordance with an antitrust consent decree. The BMI rates are typically negotiated as a percentage of the ASCAP rates. Our concern lies with whether the system through which broadcasters pay for the privilege of using composer's creative works operates in a way to enable the legitimate interests of all parties to be addressed.

The present system through which stations are licensed by ASCAP and BMI grew up in the early days of the broadcast industry. In the early days of television broadcasting, most programming was live and the local stations were not able to predict exactly what music would be performed in any one broadcast day. That is still true in much of radio broadcasting, but it is not true in the television industry where most, but not all, programming is pre-recorded. To meet the needs of earlier television and radio broadcasters, ASCAP and BMI, devised a system of blanket licensing through which a broadcaster paid a set fee for access to all the music in the ASCAP and BMI catalogs. In return for the fee, the broadcaster effectively buys an insurance policy against copyright infringement suits, and the copyright owner gets compensation for the public performance of his work.

All music performance rights, however, are not administered through the blanket licensing system. In the motion picture industry, producers deal directly with composers to acquire performance rights in the music associated with a motion picture at the same time they acquire the rights to record the music in synchronization with the action. This method of operation -- called source licensing -- was imposed on the motion picture industry as the result of an antitrust decision in the 1940's. 1/

1/ Alden Rochelle, Inc. v. ASCAP, 80 F. Supp. 888, relief, 80 F. Supp. 400 (S.D.N.Y 1948).

At that time ASCAP acquired exclusive performance licenses in the works in its catalog and the combination of that exclusive license coupled with ASCAP's market power was found to be an antitrust violation.

The remedy imposed was a requirement for ASCAP to cease requiring motion picture exhibitors to take out a blanket license, and for motion picture producers to convey the performance right in the music associated with the motion picture as part of the total license package. Independent television broadcasters, through the All-Industry Television Station Music License Committee, argue that, in the context of this industry, the present blanket licensing system is anticompetitive because it requires them to pay for access to the entire catalog of ASCAP, BMI and SESAC music even though they only perform a small portion of that music. The broadcasters favor the system that would be created by S. 1980 because they would only have to pay for the music they actually use. Further, they argue that this would put music copyright owners on the same footing as others whose works are used in television programs and compel composers and program producers to bargain for music performance rights.

Music copyright owners argue that the imposition of source licensing as the sole form of music performing rights licensing would create chaos in a smoothly functioning market. They also argue that requiring the program producer or syndicator to acquire or retain the music performance right would be unfair to the composer. This is so because only a small fraction of television pilots ever become successful shows, much less, go into syndication. Given this uncertainty, the producer, being unable to predict the ultimate success of the program, will not want to pay much in advance for the music. Many fear that under these conditions, producers would use less or only pre-written music, or they would use the cheapest music available with little regard for quality.

Broadcasters have raised their concerns in two recent cases. In the CBS case, ^{2/} licensing the performance of copyrighted music by television networks through blanket licenses was directly challenged. After a careful review of the law and industry practices, the Supreme Court concluded that, in the case

^{2/} Columbia Broadcasting System, Inc. v. ASCAP, 400 F. Supp. 737 (S., D.N.Y. 1975) rev'd 562 F. 2d. 130 (2d. Cir. 1977) rev'd sub nom, BMI v. CBS, 441 U.S. 1 (1979).

of network broadcasting, the blanket license was not anti-competitive and that the marketplace offered a viable alternative to the blanket license. The Court concluded that the television networks could deal directly with composers to secure performance licenses for the use of their works.

In *Buffalo Broadcasting*, ^{3/} the Court of Appeals for the Second Circuit heard arguments on many of the issues presented by S. 1980 and concluded that the broadcasters had failed to prove that there are no alternatives to the present blanket licensing system. First, the performing rights societies presently offer a per-program license. The rate of payment for that license is higher than the blanket license and the broadcaster's record keeping requirements are more complex. However, the court concluded that neither of those factors made the per-program license an unrealistic marketplace alternative. Second, the court concluded that broadcasters could directly obtain the performance rights from composers and they had not demonstrated that this could not be done. There was no evidence that the approach had been tried and failed. Third, the court concluded that the broadcasters had the aggregate bargaining power to obtain source licensing from the program producers if they so chose.

Having failed to sustain their position in the courts, the broadcasters now seek to have Congress impose a solution on the marketplace. We do not believe that the broadcasters have made a case for changing the law. The present licensing system works. It assures composers a continuing payment through their performing rights societies for the continuing use of their works. It respects the principle of divisibility of copyright which assures that each of the rights are separately licenseable or assignable. It imposes a minimal burden on the public. No one has asserted that the imposition of source licensing would save consumer dollars. At most, it would relieve broadcasters of the obligation to pay for their performance of composers' works and shift that burden to the program producer or syndicator, thus shifting the burden of payment to one who, at most, records the music in conjunction with the program but does not perform the music. We see no public policy served by imposing source

^{3/} *Buffalo Broadcasting Co., v. ASCAP*, 546 F. Supp. 274 (S.D.N.Y. 1982) rev'd, 744 F. 2d 917 (2d Cir. 1984), cert deno 105 Sup. Ct. 1181 (1985).

licensing on an industry that is presently efficiently functioning in a way to provide profit to broadcasters, program producers, and composers and provides the public with the tremendous variety of television programming available in this country.

In addition to this objection in principle to S. 1980, we have serious concerns about certain technical features of the bill, particularly its transitional provisions. We believe that shifting from the present blanket system to a required source licensing system in a legislatively mandated one-year period is simply unrealistic. Thousands of existing agreements between program producers and composers would have to be renegotiated to permit existing programs to be shown in syndication since present agreements are predicated on the existence of the blanket licensing system. This transition would be exceedingly complex and perhaps nearly impossible to deal with in legislation. The result would likely be the withdrawal from the syndication market of many programs.

We also do not know what impact this would have internationally. Other nations employ separate licensing systems analogous to our present blanket licensing system. It seems unlikely that foreign producers could comply with a source licensing requirement. This could consequently deprive U.S. viewers of access to foreign produced programming. Also, the response of our trading partners to this legislation is unknown. U.S. performing rights societies presently receive foreign royalties for the performance of U.S. music on foreign television. The impact of mandatory source licensing on the complex international businesses arrangements in this area is simply unknown.

The bottom line is simple -- broadcasters believe that they pay too much for their blanket licenses, and the music copyright owners believe that they are not paid enough. The Administration's concern in this issue is not with the rates charged, and we take no position as to the inherent desirability or undesirability of source licensing as a concept. The parties here concerned should be able to resolve their problems in the marketplace without resort to legislation. Examination of the information supplied by the parties in support of their positions has failed to reveal why a Federal solution is necessary given that:

- . **The present blanket licensing system has not been found to be unlawful;**

- . It has not been shown that alternatives to blanket licensing are not presently available in the market;
- . The broadcasters are financially strong and fully able to bargain for the licensing system they want, as evidenced by the success of the All Industry Committee in negotiating with the performing rights societies to get decreases in the royalty rates.
- . The proposed change raises serious questions about:
 - the impact on television programming if producers, already in a risky business, find that their costs have risen substantially,
 - the effect on present programming and programming now in syndication,
 - the effect on use of U.S. programming in foreign broadcasts and the use of foreign programming here, and
 - the impact on music output;
- . The bill undermines the principle that copyright creates a bundle of divisible rights and that an author should receive continuing payment for continuing use of his copyrighted work.

Under these conditions we do not believe that the proponents of this legislation have justified the need for government intervention to impose a single form of licensing in this industry by an amendment to the copyright law.

This concludes my prepared statement I shall be happy to answer any question you may have.

Senator MATHIAS. Our next witness is the Register of Copyrights, a graduate of this committee, Mr. Oman.

Mr. Oman, given the light of your long experience with this committee, I am going to ask you to set an example. We are not turning the red light on you immediately, we are going to give you a little bit of green, but I want you to be sensitive to the red light, and we will ask all the other witnesses to adhere very closely to the time limit.

We are glad to have Dorothy Schrader here with you this morning.

**STATEMENT OF HON. RALPH OMAN, REGISTER OF COPYRIGHTS,
LIBRARY OF CONGRESS, WASHINGTON, DC, ACCOMPANIED BY
DOROTHY SCHRADER, GENERAL COUNSEL**

Mr. OMAN. I will adhere to the red light, Senator. I am delighted to be here as always.

I would also like to pay tribute to two of my staffers, Marilyn Kretsinger and Andrea Zizzi, for their help in preparing the written statement.

My staff and I have had long talks with the representatives of both the composers and the broadcasters, and today I would like to discuss some of the equities raised by S. 1980, and try to frame some of the issues for you.

Down the road, the office will be pleased to provide technical assistance, if you want it, to perfect Senator Thurmond's current draft.

As is usual when legislative proposals reach this advanced stage of consideration, you will find merit on both sides. S. 1980 is the latest skirmish in a very old battle that pits the broadcasters, on the one hand, against most of the composers, lyricists, and music publishers on the other.

After reading your mail, hearing the lobbyists, and surveying the impressive array of talent behind me today, legal and otherwise, you know that important principles ride on the outcome. You have at stake here well-established business practices in the music and film industries. Both principles and money are at stake.

Composers and musicians founded ASCAP back in 1914 to be both a clearinghouse and a policing agency for the detection of unauthorized public performance of their works. ASCAP developed a blanket license system whereby ASCAP's members assign performing rights in their musical compositions to ASCAP, and ASCAP in turn licenses music users to perform any music in ASCAP's repertory upon payment of an agreed-upon fee.

This system was worked out with the agreement of the users, and, as Senator Gore has observed, seems to be the only practical licensing method for both the composers and the users. This was especially true historically when most music was performed live in restaurants, dance halls, theaters and taverns. Most music was spontaneous in terms of taking requests at weddings or bar mitzvahs, and a blanket license really was the only way to go.

The performing rights societies continue to license performing rights in television music by granting blanket licenses to networks and local stations. The courts supervise these licenses on a continu-

ing basis under consent decrees negotiated with the Antitrust Division back in 1950. If a local television station thinks negotiated license fees are unfair, it can ask the courts to review the reasonableness of the ASCAP rates.

Over the years, the broadcasters have repeatedly challenged the blanket licensing system under the antitrust laws, and in two recent landmark cases, the Supreme Court and the second circuit have upheld the validity and the fairness of the blanket licensing system.

As a former trustbuster with the Department of Justice, I can sympathize with the broadcasters and their desire to unleash marketplace forces by removing what in another context might be an anticompetitive device that gives one partner a bargaining advantage over the other that they would not otherwise have.

From a purely antitrust perspective, I would say that the blanket license is a tie-in sale, or a tying arrangement, that in an unsupervised context would violate the Sherman Act. But the blanket license is not unsupervised.

The District Court in the Southern District of New York scrutinizes its operation closely and continuously. If ASCAP abused its monopoly by charging monopolistic prices, or by refusing to deal, the court would pounce on them. They know that, and the broadcasters know that.

So we have seen reasonable rates and minimal court intervention. In fact, the courts have never had to intervene and actually set a rate. But their brooding presence has had a moderating effect on the demands made on either side.

In the blanket license for broadcasters, we see some unfairness since broadcasters have to pay for some of the music they never use, but they get benefits out of the blanket license, too, in terms of convenience and fair prices.

There are several protections that should be given to the composers if, in fact, you decide to proceed with this legislation. I will be pleased to discuss those in the course of my questions.

Thank you very much, Mr. Chairman.

Senator MATHIAS. Senator DeConcini, questions?

Senator DECONCINI. No, Mr. Chairman, that is all right.

Senator MATHIAS. Senator Kennedy.

Senator KENNEDY. Do we get to hear the other?

Senator MATHIAS. Ms. Schrader?

Ms. SCHRADER. No, I have no separate statement to make. I am here to respond to questions as necessary.

Senator DECONCINI. Mr. Chairman, I was deferring for the same reason. In that case, I do have questions here.

Mr. OMAN. Mr. Chairman and Senator DeConcini, if I might, I assume that everyone knew Dorothy Schrader, who is the legendary general counsel of the Copyright Office.

Senator DECONCINI. Yes, I do know Dorothy. She has appeared here on many occasions, and is extremely competent. And I thought she was also going to testify.

Are you are satisfied that the present system of contractual arrangements between ASCAP and BMI and the motion picture industry and the television industry is sufficient? When there is a disagreement and they go to court, do you think that having a

court operate this massive financial arrangement through a consent decree is the best way to leave it and not have Congress address the issue?

Mr. OMAN. There has been no demonstration of abuse under the current arrangement. And when you consider the alternatives, it might be the most desirable of several unattractive alternatives.

As Mae West observed on another occasion, "When faced with a choice between two evils, I always try the one that I have not tried before." I think that in this circumstance we would not want to follow her advice. In fact, the lesser evil is the one we are now engaging in, and it has worked reasonably well over the past 20 years.

Senator DeCONCINI. It troubles me because that is what happened with telephone deregulation. Congress did little or nothing, and finally a court did it. It seems to me that if we just leave it alone, we are shirking our responsibility as legislators. But that may be a minority view of our current responsibilities. I just do not like the idea of the court making those decisions, even if they happen to be working well in your opinion. I am not very comfortable with that situation.

Thank you, Mr. Chairman.

Senator MATHIAS. Senator Kennedy.

Senator KENNEDY. Could I ask you, just at the time when the light went on, you were, I think, about to address the issue that if the legislation did pass, what recommendations you might have for the protection of composers. Could you address that issue?

Mr. OMAN. Yes, sir.

The issue we are talking about today really is one of equilibrium. It is the court's view that, under the current circumstance, both parties are in a state of equilibrium. If we passed S. 1980, the balance, I think, would tip in favor of the broadcasters, and something would have to be done to compensate for the last bargaining power of the composers.

One thing you could do would be to allow them to bargain collectively. Senator DeConcini mentioned this a little earlier. Or you could prohibit the broadcasters from bargaining collectively as they now are allowed to do under their umbrella group of the All-Industry Television Station Music License Committee. This gives them a bargaining advantage that they would not otherwise have.

So if you do tinker with one end, you may have to tinker with the other end to compensate.

Senator KENNEDY. Well, do not the composers say that is what ASCAP does at the present time effectively?

Mr. OMAN. Under the supervision of the courts, they do bargain for the rights of the composers.

Senator KENNEDY. So how would you really be replacing the system or changing the system if you gave them that? If they were able to develop some other organization to be able to bargain for them, would you not be right back where you were at the present time if we followed your recommendation?

Mr. OMAN. Well, if they were able to give their rights to another organization, that new organization would presumably face the same antitrust impediments that resulted in the consent decree in the first place. That would be an illegal combination in restraint of

trade, and it would be illegal under the antitrust laws unless there was court supervision.

Senator KENNEDY. In your own analysis of this, where did you come out in terms of the creative part of the industry? Did you draw any conclusions whether one form of the legislation or the existing process is better for the creators of music?

Mr. OMAN. Well, the composers, I think, clearly would get less money if S. 1980 became law. And if one assumes that to continue creating—for songwriters to continue writing songs and for lyricists to continue writing lyrics—they have to have the wherewithal to pay the rent and provide for their children, I think you would see a decrease in creativity if, in fact, as a class they were getting less money.

There are those who compose for the love of composing and have independent incomes. But I think those people are clearly in the minority.

So, by and large, if S. 1980 became law, there probably would be a reduction in the number of songwriters and the amount of songs being written.

Senator MATHIAS. If you would yield at that point.

What about enforcement because it seems to me that the question of protecting rights becomes critical at this point to income? How would any individual, either musician or composer, have any knowledge of what was being played in Boston or in Baltimore? What would be the enforcement of rights?

Mr. OMAN. It would be difficult, and I suspect there probably would be requests for greater Government involvement in monitoring those rights, and probably greater expense on all sides in terms of forms to be filled out, monitoring that would be going on on behalf of individual composers, and just generally more overhead than is currently the situation under the ASCAP, BMI, and SESAC arrangements.

Senator KENNEDY. Thank you.

Senator MATHIAS. Senator Gore mentioned the fact that you hear American music all over the world. And clearly American music is a major export item. And in an unhappy trade picture, we want to be conscious of what this valuable trade asset really is.

What is the practice, let us say, with our trading partners in Europe with respect to music licensing?

Mr. OMAN. With respect to music licenses, they are similar in some respects and different in others. In terms of the licensing for theatrical performance in connection with movies, they do have a different arrangement under the U.S. law. Because of antitrust cases brought back in the 1940's, source licensing is mandated in the film industry. That is not the case in Europe. And the composer is represented by his collecting societies and gets money for theatrical performances from the theater operator.

In terms of the television and radio licenses, they do have blanket licensing with collections by the agencies.

Senator MATHIAS. All right.

If S. 1980 were to be adopted—I suppose really the nub of my question is what change would this make in our relationship with our major trading partners?

Mr. OMAN. I suspect they would resent it, since their composers, like most of the composers, would get less money. They already feel they pay a disproportionate share of their collections to U.S. authors and composers, and I think they would resent this reduction in their source of income.

Senator MATHIAS. Well, aside from their feelings on the subject, what would they do about it?

Mr. OMAN. I suspect they probably would try to avoid payment on a blanket license system for U.S. theatrical motion pictures, and that would result in a huge loss of revenues for the United States.

Senator MATHIAS. Do you think that the passage of S. 1980 would improve conditions for American composers in the marketplace any way?

Mr. OMAN. Ms. Schrader is nodding enthusiastically in my peripheral vision.

Ms. SCHRADER. No.

Mr. OMAN. Let me ask Ms. Schrader to answer that question.

Ms. SCHRADER. As we have indicated in our written testimony, we are very concerned about the effect on composers of S. 1980. It is difficult to predict the future, but it would seem to us that they would not have the same bargaining power as they do through the blanket license system. They would therefore get less money. That in itself is not an improvement from our point of view in terms of the effect on creativity.

We also have some concern about the departure from the principle of divisibility, which was very clearly and strongly established in the 1976 act. It was established as part of that revision of the law after many years of thought and consideration. This bill does represent a step backward in terms of eroding the divisibility principle to the detriment of the copyright owners.

Senator MATHIAS. We have some other questions that I am going to submit to you in writing. We need to conserve time. But we appreciate your being here this morning.

Mr. OMAN. Thank you very much, Mr. Chairman.

Senator KENNEDY. I want to thank you for coming back. I remember your service to the committee, and we are very grateful to you for coming back and helping us.

Mr. OMAN. Thank you very much, Senator Kennedy.

[Mr. Oman's submissions for the record follow:]

PREPARED STATEMENT OF RALPH OMAN

SUMMARY

Composers and musicians founded ASCAP in 1914 to be both a clearinghouse and a policing agency for the detection of unauthorized public performance of their works. ASCAP developed a blanket license system whereby ASCAP's members assign performing rights in their musical compositions to ASCAP; in turn ASCAP licenses music users to perform any music in ASCAP's repertory as often as desired, upon payment of an agreed-upon fee.

ASCAP developed the blanket license at a time when music was performed live in restaurants, dance halls, theaters, and taverns. Much music was performed spontaneously, and a blanket license seemed the only practical licensing method for both composers and users.

Movie producers pay composers a fee for recording their compositions on film (the "synchronization right"). Originally, theatres had to buy a blanket license from ASCAP or a later-developed performing rights society, to clear the performing rights in the film music for theatrical exhibition, but this practice was changed in the late 1940's as a result of the court's finding in *Alden-Rochelle* that the practice violated the anti-trust laws. The court ordered producers to clear all performing rights, including music, for theatres.

Performing rights societies continue to license performing rights in television music by granting blanket licenses to the networks and local stations. The courts supervise these licenses on a continuing basis under consent decrees negotiated with the Antitrust Division back in 1950. If a local television station thinks the negotiated license fees are unfair, it can ask the courts to review the reasonableness of the ASCAP rates. Over the years the broadcasters have repeatedly challenged the blanket licensing system on antitrust grounds, and in two recent landmark cases, the Supreme Court and the Second Circuit upheld the validity and the fairness of the blanket license system.

Through years of custom and practice, the blanket license has emerged as the most practical way to license music performance rights. Courts have regularly responded to the charges made by broadcasters and reviewed the blanket license. The rate of the license has been reduced, and the availability of other licensing methods, such as "per program" and "direct" has been stressed. Source licensing is also legally available.

Although composers of film and television music generally create under work-for-hire agreements that give the copyright to the producer, the custom and practice of 30 years is that the composers receive at least one-half of the performing rights royalties, in addition to whatever "up-front" compensation the producer pays them. The principle of continued payment for continued use of their creations is very important to composers and other creators.

S. 1980 is the first attempt to change these long-standing practices legislatively; the bill mandates source licensing for music performance rights in syndicated programs. S. 1980 warrants only one method of licensing and proposes to change a system that the courts have found functions competitively. It should be evaluated in terms of the effect of the bill on the income of composers, the practical effectiveness of the collecting society system, and the copyright principle of divisibility of rights.

* * *

Mr. Chairman and members of the Subcommittee, I appreciate the opportunity to appear here today to testify on S. 1980 (introduced by Senator Thurmond on December 18, 1985). This bill is specifically designed to aid local television stations by changing the current system for licensing performing rights in copyrighted music embodied in the soundtrack of nonnetwork programs broadcast on television.

The bill would shift the responsibility for licensing these performing rights from local broadcasters to program producers. It would do so by prohibiting the conveyance of the right to publicly perform an audiovisual work by a nonnetwork commercial television broadcast without simultaneously conveying the right to perform the music fixed in the soundtrack. This would eliminate the currently universal blanket licensing system for these performances, which is possible now because of separate licensing of the synchronization right and the performing right in copyrighted music, and would replace it with a mandatory "source licensing" system. Television stations have recently attempted to achieve that result through antitrust litigation against the performing rights societies that administer the blanket licensing system, and the courts have consistently upheld the legality of the blanket licensing system.

I want to review the historic development of the customs and practices of licensing performing rights in television and motion picture music to put in perspective the Copyright Office's analysis of S. 1980.

I. BACKGROUND OF TV MUSIC LICENSING

A. The Performing Rights Societies.

In 1897, Congress established as one of the author's rights included in a copyright of a musical work the exclusive right to perform the work publicly;^{1/} under this right each individual public performance of a musical work was subject to the copyright owner's exclusive control, and each individual unauthorized performance of a musical work in public was an infringement. However, the composers and songwriters of musical works soon found it beyond their capacity to detect the unauthorized public performance of their works in theatres, dance halls, taverns, and other locations across the country. Furthermore, music users had no practical means to locate and negotiate licenses with composers whose music they wished to perform.^{2/}

To respond to these difficulties, a group of composers and musicians founded the American Society of Composers, Authors and Publishers (ASCAP) in 1914.^{3/} ASCAP developed a blanket licensing system whereby ASCAP's member composers and publishers would assign exclusive rights to ASCAP so that only ASCAP could license the public performance of the

1. Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (current version at 17 U.S.C. §106(4)(1976)). For a discussion on the divisibility of the performing right see *infra*, pp. 28-29.

2. *Buffalo Broadcasting Co. v. ASCAP*, 546 F.Supp. 274, 277 (S.D.N.Y. 1982), *rev'd*, 744 F.2d 917 (2d Cir. 1984), *cert. den.* 105 Sup. Ct. 1181 (1985).

3. *Id.*

composers' copyrighted works. ASCAP in turn would license music users to publicly perform any music in ASCAP's repertory as often as desired, upon payment of an agreed-upon fee.^{4/} ASCAP acted on behalf of its members to guard against infringement of works in its repertory by monitoring public performances of music, bringing copyright infringement actions on behalf of its members, and serving as a clearinghouse for copyright owners by collecting and distributing to its member composers and publishers the royalties paid to ASCAP by licensees.^{5/}

In 1940 Broadcast Music, Inc. (BMI) was founded by members of the radio broadcast industry to increase their bargaining power in negotiating performing rights licenses. SESAC Inc. (formerly called the Society of European Stage Authors and Composers), a privately owned society, is the smallest of the performing rights societies operating in the U.S.^{6/} ASCAP has emerged as the largest and most powerful of the performing rights societies.

B. Licensing of Music Performed in Movie Theatres.

When ASCAP was a fledgling organization, it monitored the public performances of musical compositions by bands and orchestras in hotels, theatres, and places of amusement, and it later monitored performances by radio broadcast.^{7/} When silent motion pictures were first shown in theatres, music was supplied by a piano player or an orchestra, but theatre

4. Id.

5. Recent Development, Blanket Licensing of Music Performing Rights: Possible Solutions to the Copyright-Antitrust Conflict, 37 Vand. L. Rev. 183, 186 (1984).

6. S. Shemel & M.W. Krasilovsky, This Business of Music 184 (1985).

7. Alden-Rochelle, Inc. v. ASCAP, 80 F.Supp. 888, 891 (S.D.N.Y. 1948).

owners refused to pay royalties for performing musical compositions in the theatre. However, after ASCAP brought a number of infringement suits against theatre owners, in 1923 theatre owners began obtaining blanket licenses whereby each theatre paid ASCAP an annual fee based on seating capacity.^{8/}

When motion pictures with sound were introduced in 1928, new licensing problems arose. At first the sound part of the motion pictures was recorded on phonograph discs which were operated by the theatre in synchronization with the pictures projected on the screen. Later, the "sound track" method evolved whereby the sound is recorded on a strip of sound cells attached to the film itself and projected with the aid of the photo-electric cell.^{9/}

At this point, new copyright licensing practices developed. ASCAP member composers would license to movie producers the right to record their compositions on the film (the "synchronization right"), but expressly refused to license the performing rights in the music. The performing rights continued to be licensed through ASCAP directly to the movie theatres that actually performed the works. Motion picture producers rented their films to the theatre operators with a provision in the rental contract that the film would be exhibited only in theatres that held ASCAP licenses.^{10/} Often movie producers had a financial interest in the ASCAP

8. Id. at 891-2.

9. Id. at 892.

10. Id.

pool of royalties, because many producers owned music publishing corporations who owned rights in ASCAP compositions and were entitled to a share of the 50% of the ASCAP royalties distributed to music publishers.^{11/}

In 1942, motion picture exhibitors filed a complaint alleging that ASCAP and its members violated federal antitrust laws through the operation of the blanket license for the public performance of musical compositions in movie theatres.^{12/} The district court found that, although ASCAP licensing fees were "very reasonable,"^{13/} the combination of ASCAP members in transferring all their non-dramatic performing rights in an exclusive license to ASCAP was a combination in restraint of trade in violation of section one of the antitrust laws.^{14/} The court also found that the practices that had developed between motion picture producers and ASCAP members regarding the operation of the blanket license constituted an unlawful combination of parties in violation of section one.^{15/}

In a separate proceeding,^{16/} the Alden-Rochelle court ordered ASCAP and its members to refrain from enforcing the motion picture performing rights of any musical compositions in its repertory and from obtaining any such performance rights in the future. In addition, the court, in effect, ordered composers to license the right of public performance in their musical compositions to the motion picture producers to whom they grant synchronization rights in those compositions. Thus, the court

11. Id. at 892-3.

12. Alden-Rochelle, Inc. v. ASCAP, supra note 8.

13. Id. at 892.

14. Id. at 894.

15. Id. at 894-5.

16. Alden-Rochelle, Inc. v. ASCAP, 80 F.Supp. 900 (S.D.N.Y. 1948).

ordered that the licensing of the performance right in musical compositions synchronized with motion picture film be achieved by a practice known today as "source licensing."

C. Licensing of Music Performed by Television Broadcast.

1. Operation of the Blanket Licenses Pursuant to Consent Decrees. Ever since television became commercially viable in the 1940's, the national television networks and local television stations have obtained public performance licenses for the music included in their live and taped programming through ASCAP and BMI blanket licensing arrangements.^{17/} The first blanket license for television performing rights, offered by ASCAP from 1941 until its cancellation in 1948, was gratuitous.^{18/} At that time, while the Alden-Rochelle case was being litigated, ASCAP and BMI granted blanket licenses pursuant to 1941 consent decrees that resulted when the U.S. Justice Department sued each society as being an unlawful combination in restraint of trade under the antitrust law.^{19/} ASCAP's 1941 consent decree prohibited ASCAP from acquiring exclusive performing rights from its members, and ordered ASCAP to provide the option of a per-program license to requesting licensees.^{20/} BMI's consent decree

17. Columbia Broadcasting System, Inc. v. ASCAP, 400 F.Supp. 737 (S.D.N.Y. 1975), rev'd 562 F.2d 130 (2d Cir. 1977), rev'd sub nom., BMI v. CBS, 441 U.S. 1 (1979) (networks); Buffalo Broadcasting v. ASCAP, 546 F.Supp. at 287 (local television stations).

18. 546 F.Supp. at 287.

19. BMI v. CBS, 441 U.S. 1, 10 (1979) (citing complaint in United States v. ASCAP, Civ. No. 13-95 (S.D.N.Y. 1941), pp. 3-4).

20. United States v. ASCAP, 1940-43 Trade Cas. (CCH) ¶56,104 (S.D.N.Y. 1941).

was similar, but it allowed BMI to retain the right to assert exclusive performing rights in compositions of which it owned the copyright or exclusive publishing rights.^{21/}

In 1950, ASCAP's 1941 consent decree, which was still valid with respect to blanket licenses for the performance of television music, was amended to address the complaints of motion picture exhibitors in the Alden-Rochelle case. Under the amended decree, which still substantially controls ASCAP's activities, the following restrictions were put on the operation of ASCAP's licensing system: ASCAP's licensing authority is not exclusive; both the user and the owner of a composition in ASCAP's repertory must request in writing that ASCAP grant a performance license for the composition; ASCAP may not insist on the blanket license, and the fee for the per program license, which is to be based on the revenues for the specific program licensed, must offer the user a genuine economic choice between the per program license and the blanket license; and, if ASCAP and a potential licensee are unable to agree on a fee within 60 days from the date of application, the applicant may apply to the District Court for the Southern District of New York for a determination of a reasonable fee, with ASCAP having the burden of proving reasonableness.^{22/} Similar restrictions were later placed on BMI.^{23/} Between 1951 and 1954, and again between 1964

21. U.S. v. BMI, 1940-43 Trade Cas. (CCH) ¶56,096 (E.D. Wis. 1941). However, BMI's later consent decree enjoined BMI from engaging in the commercial publication, recording, or distribution of music. U.S. v. BMI, 1966 Trade Cas. (CCH) ¶71,941 (S.D.N.Y. 1966).

22. United States v. ASCAP, 1950-51 Trade Cas. (CCH) ¶62,595 (S.D.N.Y. 1950).

23. The BMI decree does not specify that the district court may set the fee if the parties are unable to agree. However, courts have concluded in antitrust litigation that the practices of ASCAP and BMI are similar for antitrust purposes. See, e.g., CBS v. BMI, 441 U.S. 1, 12, n. 20 (1979).

and 1969, local television stations negotiated with ASCAP pursuant to the amended consent decree concerning the rates for the blanket and per program licenses.^{24/}

The amended consent decrees have repeatedly been challenged and sustained on antitrust grounds. The courts have twice construed ASCAP's 1950 amended decree not to require ASCAP to issue licenses for selected portions of its repertory (i.e., country music, jazz, etc.).^{25/} The legality of the blanket license was upheld in an infringement suit brought by ASCAP members against individual radio stations in which the stations argued that the blanket license constitutes illegal price fixing and ASCAP is a combination in restraint of trade.^{26/} The first direct challenge to the blanket license for the public performance of television music arose in Columbia Broadcasting System, Inc. v. ASCAP,^{27/} a case in which the television network CBS brought an antitrust action against ASCAP and BMI and their members and affiliates. In a landmark decision, the Supreme Court ultimately held the blanket license was not a per se violation of the antitrust laws, and the Second Circuit, after applying a rule of reason analysis, sustained the validity of the blanket license.

24. See United States v. ASCAP (Application of Voice of Alabama, Inc.), Civ. No. 13-95 (S.D.N.Y. 1951); United States v. ASCAP (Application of Shenandoah Valley Broadcasting, Inc.), Civ. No. 13-95 (S.D.N.Y. July 28, 1969) (final order).

25. United States v. ASCAP (Application of Shenandoah Valley Broadcasting, Inc.), 208 F.Supp. 896 (S.D.N.Y. 1962), aff'd, 331 F.2d 117 (2d Cir. 1964), cert. den., 377 U.S. 997 (1964); United States v. ASCAP (Application of National Broadcasting Co.), 1971 Trade Cas. (CCH) ¶73,491 (S.D.N.Y. 1970). See also United States v. ASCAP (Motion of Metromedia, Inc.), 341 F.2d 1003 (2d Cir. 1965).

26. K-91, Inc. v. Gershwin Publishing Corp., 372 F.2d 1 (9th Cir. 1967), cert. den., 389 U.S. 1045 (1968).

27. CBS v. ASCAP, supra, note 17.

To better understand the factual issues that arise when investigating whether the blanket licenses are anticompetitive, and whether the present system of licensing television music fosters creativity, it is useful to examine how the television industry operates today.

2. Use of Music By Television Networks and Local Television Stations. There are approximately 800 local television stations currently in operation. The three national television networks each own and operate several stations^{28/} in the top fifteen television markets in the United States and each has approximately 200 affiliated local stations.^{29/} Local television stations, whether network-affiliated or independent, have three principal sources of programming: network programming; syndicated programming; and locally-produced programming.^{30/} The rights to most network and syndicated programming, which make use of copyrighted music that is prerecorded on a soundtrack, are purchased by the networks or the local stations from the independent television or motion picture production companies, known as "program packagers."^{31/}

Syndicated programming includes theatrical motion pictures, prerecorded television programs, and live programs offered by program packagers and distributors to be broadcast as nonnetwork programs. Such

28. Each network presently owns between 4-8 stations. FCC regulations provide that no broadcast licensee may control more than 12 television stations or reach more than 25% of the national television market. 47 C.F.R. §73.3555(d) (1985).

29. See Television Cable Fact Book, Cable & Services Vol., pp. 98, 102, 106 (1984).

30. Buffalo Broadcasting v. ASCAP, 546 F.Supp. at 279.

31. Id. (syndicated programming); CBS v. ASCAP, 400 F.Supp. at 742 (network programming). However, a small percentage of network and syndicated programming was originally produced by the networks. 400 F.Supp. at 742.

programming might typically comprise 65-75% of the total nonnetwork programming of local network-affiliated stations. The bulk of syndicated programming on all local stations is comprised of prerecorded programs previously broadcast on network television ("off-network programming"), and of theatrical motion pictures. The remainder, about 35%, is produced specifically for syndication, and is known as first-run syndicated programming. Most local stations own inventories of syndicated programs to which they own the broadcast rights, just as the networks own inventories of programs, feature films, and commercials that will be rerun.^{32/}

Music is used in television programming in three principal ways: as theme, background, or feature music. Theme music is the music used to introduce and close a program. Background music is used to complement action on the screen. Feature music is music used as the focus of audience attention, such as a song sung by a performer on a variety show. While virtually all television programs make some use of music, the predominant portion of that music consists of background and theme music.^{33/} While the composition of background music often requires great expertise and may significantly contribute to the overall entertainment value of a program, such music is usually interchangeable.^{34/}

Most locally-produced programs contain theme music, some contain background music, and a few contain feature music. Local stations have the ability to make specific decisions about which music to use in most of their locally-produced programs; they acquire the music from music

32. 546 F.Supp. at 279; 400 F.Supp. at 742, 775, 777.

33. 546 F.Supp. at 281; 400 F.Supp. at 755.

34. 546 F.Supp. at 281.

production companies, music libraries, or background music services.^{35/} Local stations do not, however, have the ability to control the use of music (usually theme or background music) in locally-produced commercials, which is predominantly copyrighted music in the ASCAP/BMI repertory.^{36/}

Ordinarily, the music in network and syndicated entertainment serials is predominantly theme and background music created by a composer and perhaps a songwriter hired by the program's producer.^{37/} The producers, who are engaged in a high-risk business,^{38/} usually obtain music for their programs by two means: (1) by engaging a composer-for-hire to write original music; and/or (2) by obtaining a license for the right to use desired preexisting compositions from a music publisher or its agent (usually the Harry Fox Agency).^{39/} The cost of obtaining the right to music is usually 2% or less of the total production costs of a given program.^{40/}

35. Id.

36. Id.

37. 400 F.Supp. at 755.

38. 546 F.Supp. at 282; with respect to the business of syndicated programming, there are hundreds of syndicators and thousands of syndicated programs available for purchase by local stations. Since a relatively small percentage of these programs have had network runs which demonstrate potential for the programs' popularity within a given market, syndicators do not know at the time of syndication which programs will be performed often. See 546 F.Supp. at 280.

39. 546 F.Supp. at 283; 400 F.Supp. at 756. The Harry Fox Agency is a clearinghouse for synchronization rights in copyrighted music. The agency represents virtually every major publisher in negotiations with program producers who wish to record copyrighted music on the soundtrack of a filmed or taped program. 400 F.Supp. at 760.

40. 546 F.Supp. at 283.

Where a producer hires a composer to write music for a program, the production company generally owns the copyright in a work made for hire. The composer, who is usually a member of ASCAP or BMI, negotiates with the producer for an "up-front" fee for his/her services, on the understanding that the royalties from public performances other than in movie theatres will be divided equally between the composer and the music publisher. Since the producers often own publishing subsidiaries, the producer often insists, as part of the work for hire agreement, that its subsidiary must publish the music; thus, the composer will receive the writer's share of any performing rights royalties distributed by ASCAP or BMI, and the music publisher's share will frequently go to the producer's subsidiary or affiliate.^{41/}

The "up front" fee paid by the producers to the composer-for-hire is typically small, and may not cover the composer's expenses in producing a master recording of the score. The composer receives the bulk of his/her income from licensing the public performance right.^{42/}

The producer does not have as much control when licensing feature music. Such music has been previously composed and is frequently licensed by a publisher who is not connected with the program production company; the publisher might be represented by the Harry Fox Agency. In negotiations with the publisher, the producer will not obtain performing rights. The licensing of the synchronization rights in preexisting feature music is characterized by price competition.^{43/}

41. Id.

42. See, e.g., L. Sobel, A Movie and TV Producer's Guide to Acquiring and Earning Income from Soundtrack Music, Part I, 7 Ent. L. Rptr. 3 (Oct. 1985).

43. 546 F.Supp. at 284; 400 F.Supp. at 736.

Because composers and music publishers retain the performing rights in most television music, program packagers and syndicators are unable to transfer the rights to networks or local television stations. These stations, therefore, must obtain licenses to avoid copyright infringement for publicly performing the protected music on television. Ordinarily the networks and stations obtain blanket or per program licenses from ASCAP and BMI.

The fees payable by the networks and local stations to ASCAP and BMI do not vary according to the significance, quality or value of any music in a particular program; moreover, fees do not vary according to the extent to which music in the ASCAP or BMI repertory is actually used if the blanket license is employed. The annual sum which network and local television stations pay for public performance licenses, though substantial, is but a small fraction of the stations' revenues.^{44/}

Television stations became increasingly dissatisfied with the operation of blanket licensing under ASCAP's 1950 amended consent decree. Accordingly, in 1975 CBS brought a lawsuit claiming that ASCAP's licensing system for music performed on network television stations violates federal antitrust law.^{45/} Buffalo Broadcasting Co. and a class of owners of local television stations brought a similar suit in 1982 with respect to ASCAP's licensing system for music performed on local television stations.^{46/}

3. The CBS Litigation. In its complaint filed in CBS v. ASCAP, CBS argued that ASCAP and BMI are unlawful monopolies and that the blanket license is illegal price fixing, an unlawful tying arrangement, a concerted

44. 546 F.Supp. at 282.

45. CBS v. ASCAP, *supra*, note 17.

46. Buffalo Broadcasting v. ASCAP, *supra*, note 2.

refusal to deal, and misuse of copyright. The district court found that the practice did not fall within the per se rule^{47/} for proving a restraint of trade in violation of section 1 of the Sherman Act,^{48/} and, after a trial, the court dismissed the complaint. Since direct negotiation with individual copyright owners was available to CBS as a feasible method of licensing the performing rights at issue, the court held the blanket license, judged by the rule of reason, is not an illegal restraint of trade.^{49/}

Though agreeing with the district court's factfinding, the Court of Appeals reversed the lower court's judgment, and held that the blanket license issued to television networks is a form of price fixing illegal per se under the Sherman Act.^{50/} The Supreme Court disagreed with the Court of Appeals' conclusions with respect to the per se illegality of the blanket license, and reversed its judgment and remanded the case for analysis of the antitrust claims under the rule of reason.^{51/}

47. The essential ingredient of an antitrust violation is the determination of whether a practice is in restraint of trade. This can be proved by one of two methods: the per se analysis or the rule of reason. Under the per se analysis, only concerted actions which unreasonably restrict competitive conditions violate section one; such actions are considered blatantly anticompetitive without redeeming quality, and are conclusively unreasonable, so the plaintiff's burden of proof is relatively low. For example, both horizontal and vertical price fixing agreements are per se illegal. William C. Holmes, Intellectual Property and Anti-trust Law §5-4 (1983). See *infra*, note 61 for a summary of the rule of reason.

48. CBS v. ASCAP, 337 F.Supp. 394, 398 (S.D.N.Y. 1972).

49. CBS v. ASCAP, 400 F.Supp. at 781-83.

50. CBS v. ASCAP, 562 F.2d at 140.

51. BMI v. ASCAP, 441 U.S. at 24-25.

In reaching its conclusion about the blanket license, the Supreme Court stressed that the intersection of antitrust and copyright conditions inherent in the licensing of performing rights in the music industry is unique, and examination of the licensing system thus deserves sui generis attention.^{52/} Beginning its per se analysis of the blanket license in this context, the Supreme Court noted that the Justice Department, representing the Federal Executive, and the Judiciary each carefully scrutinized ASCAP and its licensing practices under the 1950 consent decree, and each stood ready to provide further consideration, supervision, and perhaps invalidation of asserted anticompetitive practices under the decree. Furthermore, the Justice Department filed an amicus brief in the CBS case urging that the blanket license under the consent decrees is not a per se violation of the antitrust law. The Court thought these factors indicate that the license may have redeeming competitive virtues.^{53/} The Supreme Court also found that by creating compulsory blanket licenses for cable retransmissions, jukebox performances and performances by noncommercial broadcasters in the Copyright Act of 1976, Congress itself found the blanket licensing mechanism to be economically beneficial in at least some circumstances.^{54/}

The Court stressed that the line of commerce allegedly being restrained by ASCAP's practices is the market for performing rights to copyrighted music, and that market exists at all only because of copyright

52. Id. at 10.

53. Id. at 13.

54. Id. at 15-16.

law. The Court thus reasoned that any market arrangements reasonably necessary to effectuate the performing rights granted under the Copyright Act should avoid illegality under the per se antitrust analysis.^{55/}

The Supreme Court found that the blanket license is not a "naked restraint of trade with no purpose except stifling competition" because the license achieves an efficient integration of sales, monitoring and enforcement purposes.^{56/} Furthermore, the Court noted that the efficiencies achieved by the blanket license are beneficial to both sellers and buyers.^{57/} Though the blanket license creates a market in which individual composers are inherently unable to compete with full effectiveness,^{58/} it is unlikely to cause decreased output, and does offer monetary incentive for composers to create music that is demanded by consumers.^{59/} Finally, the Court indicated agreement with the district court's finding that direct licensing is available to music users as an alternative to blanket licensing.^{60/}

55. Id. at 19.

56. Id. at 20-21.

57. Id. at 21.

58. Id. at 23.

59. The Court noted that because compositions can be simultaneously "consumed" by many users, composers have numerous markets and numerous incentives to produce; thus, the blanket license is unlikely to create decreased output. Since popular songs get an increased share of ASCAP's and BMI's revenue distributions, composers compete even within the blanket license in terms of productivity and customer satisfaction and, thus, composers have monetary incentive to create popular music. Id. at 22, n. 40.

60. Id. at 24.

On remand, the Court of Appeals scrutinized ASCAP's blanket licensing practices under the rule of reason^{61/} analysis of antitrust violations.^{62/} In balancing the blanket license's competitive and anti-competitive effects, the court pointed out that the absence of price competition among songs under the blanket license does not mean that the license is a restraint on potential competition.^{63/} This is so because if the opportunity to purchase performing rights to individual songs is fully available, then it is customer preference and not the license itself that causes the lack of price competition among musical compositions.

The court found that CBS could not prove the restraining effect of the blanket license because it did not prove the non-availability of alternatives; to the contrary, the district court found that "if CBS were to seek direct licensing, 'copyright proprietors would wait at CBS' door.'"^{64/} Thus, the blanket license passed the rule of reason test because, though networks could realistically approach individual copyright owners to "direct license" performing rights, they preferred to use the blanket license. Customer preference was responsible for any lack of price

61. The rule of reason analysis, less rigorous than the *per se* rule, allows a legitimate business purpose to outweigh an indirect effect on competition to sustain the legality of a particular practice. The rule of reason allows a balancing of the following factors to determine competitive unreasonableness: (1) the nature of the challenged restraint -- size of the organization and importance of the market issues; (2) competitive effect and magnitude of the injury; (3) purpose of the restraint as a legitimate business purpose or solely to suppress competition. W. Holmes, *supra*, note 47, at 5-25, 5-27.

62. *CBS v. ASCAP*, 620 F.2d 930 (2d Cir. 1980), *cert. den.*, 450 U.S. 970 (1981).

63. 620 F.2d at 935.

64. *Id.* at 938, *citing* 400 F.Supp. at 779.

competition in the licensing process. The court noted that CBS "cannot expect the antitrust laws to assure it that a changeover to direct licensing can be accomplished instantly or at no expense."^{65/}

Though the legality of the blanket license was ultimately sustained with respect to music performed by network television stations, the blanket license received yet another challenge. In 1982, in Buffalo Broadcasting Co. v. ASCAP,^{66/} the District Court for the Southern District of New York again examined the legality of the blanket license, this time regarding music performed by local television stations.

4. The Buffalo Broadcasting Litigation. In Buffalo Broadcasting, a class of owners of local television stations argued that blanket licensing of performing rights to local television stations is a restraint of trade, because the system requires "the splitting of the licensing of television performing rights from the licensing of all other music rights at the source," which causes absence of price competition between and among musical compositions.^{67/} Using the Second Circuit's rule of reason inquiry from the CBS-remand case, the district court sought to determine whether the local television stations have any realistically available alternatives to blanket licensing and, if not, whether on balance the blanket licensing system's anticompetitive effects outweigh its procompetitive effects.^{68/}

The district court considered the possibilities of the program license, direct licensing, and source licensing, and concluded that local television stations lacked a realistically available alternative to the

65. Id. at 957.

66. Buffalo Broadcasting v. ASCAP, *supra*, note 2.

67. 546 F.Supp. at 285.

68. Id. at 286.

blanket license.^{69/} The court found the per program license to be too costly and burdensome to be a realistic alternative,^{70/} it found that local television stations are individually not powerful enough to be able to bargain effectively with the copyright owners and the Harry Fox Agency for a direct license,^{71/} and it found source licensing to be an unrealistic alternative because syndicators would have no incentive to depart from their standard licensing practices.^{72/}

Balancing the procompetitive and anticompetitive effects of the blanket license, the court found that the blanket license's transaction cost savings are negligible regarding most music contained in local programming since negotiations for performing rights could be handled simultaneously with those for the synchronization rights for most syndicated programming.^{73/} It also found that copyright owners' monitoring costs would be eliminated under source licensing, that syndicators could afford to pay for the performing rights, and that for local television stations, flexibility in selecting from a repertory of music at any time is not important, since local stations broadcast few live performances.^{74/} The district court concluded that the cost savings of the blanket license are insignificant for local stations and do not balance the anticompetitive

69. Id. at 293.

70. Id. at 289.

71. Id. at 291.

72. Id. at 292.

73. Id. at 294-5.

74. Id. at 295.

consequences of the absence of price competition.^{75/} Thus, the court held the blanket license to be a restraint of trade.

On appeal, the Second Circuit agreed with the district court's method of inquiry and subsidiary factual findings, but rejected its legal conclusions concerning the availability of realistic alternatives to the blanket license,^{76/} and thus reversed the district court's holding.^{77/}

The Second Circuit concluded that the program license is a realistic alternative to the blanket license. It disputed the lower court's finding that the program license is too costly as compared with the blanket license to be realistic because the high program rate is only charged against the base of revenue from a particular program, the rate was negotiated for the stations by the All-Industry Committee, the price was not demonstrated to be higher than the bundle of rights obtained by a station that merely wants to clear the performance rights for a particular program, and the ASCAP rate is subject to judicial review pursuant to the 1950 consent decree.^{78/} Nor did the appeals court find the record-keeping requirements unduly burdensome.^{79/} Thus, the Second Circuit found the per program license a limited alternative to the blanket license, as well as a realistic fall-back license local stations can rely on if they attempt to obtain performing rights through direct or source licensing.

75. Id. at 296.

76. 744 F.2d at 926.

77. Id. at 933.

78. Id. at 926-7.

79. Id. at 927-8.

The Second Circuit found that the lower court misconstrued the issue in examining the alternative of direct licensing. Rather than looking to the relative bargaining power of local stations as compared to networks vis-a-vis copyright owners, the Second Circuit looked to the issue of whether the local stations in fact have been shown to lack power sufficient to give them a realistic opportunity to secure direct licenses. Since the court was presented with no evidence indicating that any local station ever offered any composer a sum of money in exchange for performing rights to his or her music, the court concluded that local stations did not demonstrate that a brokering mechanism such as the Harry Fox Agency would not handle direct licensing transactions if the stations offered to pay royalties directly to copyright owners.^{80/}

With respect to source licensing, the appellate court rejected the district court's conclusion that source licensing is not a realistic alternative because syndicators have no motivation to depart from their standard practices. The court suggested that despite the strong bargaining power of a syndicator of a highly successful program, the syndication market would not be unresponsive to "aggregate demand from stations willing to pay a reasonable price for source licensing of music performing rights."^{81/} The court stressed that under the Copyright Act of 1976 composers have a right to license separately the public performance of their works.^{82/}

80. Id. at 928 - 29.

81. Id. at 931.

82. Id. at 932.

The Second Circuit concluded its opinion with a discussion of its observation that the evidence in this case does not establish that barring the blanket license for syndicated programs in favor of a source licensing scheme would add any significant price competition among musical compositions that the blanket license allegedly prevents.^{83/} The court noted that it is a matter of speculation whether any significant increase in price competition for music would occur when television stations decide which syndicated programs to purchase in a world of source licensing.

Concurring with the Second Circuit's holding that local stations did not demonstrate that the blanket license is a restraint of trade, Judge Winter wrote separately to beseech potential antitrust plaintiffs to refrain from needless litigation over the blanket license for television music. Judge Winter stated that the CBS and Buffalo Broadcasting litigation demonstrates that so long as composers and producers have no horizontal agreement among themselves to refrain from source or direct licensing and there is no other artificial barrier, such as a statute, to their use, a non-exclusive blanket license cannot restrain competition, and it is simply one alternative licensing mechanism competing on the basis of price and services with others. Thus, he argues, the present market for performing rights indicates the competitive superiority of the blanket license.^{84/}

83. Id. at 932-3.

84. Id. at 933-4.

D. The Bargaining Power of Composers.

As was pointed out by the courts in the CBS and Buffalo Broadcasting litigation, most of the theme and background music utilized in the soundtracks of television programming is created by "composers-for-hire."^{85/} The economic rights of composers have fluctuated over the years as their union/non-union status has changed. The following discussion will indicate why composers, as employees-for-hire under the copyright law, nonetheless have an interest in the blanket license system that ensures continued payment to copyright owners for continued use of a protected work.

85. The copyright for work done by composers ordinarily belongs to the producer under the "work for hire" doctrine, either because the composer is a staff employee or because he/she has signed a work for hire agreement.

A "work for hire" is--

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work...

17 U.S.C. §101 (1976).

- (a) Initial Ownership.--Copyright in a work protected under this title vests initially in the authors of the work.
- (b) Works Made for Hire.--In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

Id. at §201.

In the early days of soundtrack filmmaking, composers, like screenwriters, received a salary for which they wrote music as required, and generally worked as members of the staff of the movie studios. The company, which directly supervised the composer's work, took all rights in the music.^{86/}

During the 1930's, the motion picture industry was unionized. In the early 1950's the Screen Writers Guild successfully negotiated contract provisions giving the writer control over part of the copyright. These provisions recognized the principle of "separation of rights" by which, for example, a writer could grant publication rights to one publisher and motion picture rights to a different company.^{87/} However, the composers did not form a guild until 1954, when the Composers and Lyricists Guild of America (CLGA) was established.^{88/}

The CLGA was granted bargaining union status by the National Labor Relations Board in 1955. The first agreement between the CLGA and the Association of Motion Picture and Television Producers (AMPTP) was concluded in 1960. It established minimum fees, work benefits and other forms of compensation for film and television composers. Even after unionization, the industry practice of producers taking complete ownership of the copyright in music remained in effect.^{89/} However, the CLGA achieved an important gain for composers by negotiating a provision in the

86. F. Hawlicek and J.C. Kelso, The Rights of Composers and Lyricists: Before and After Bernstein, 8 Colum.-VLA Art & the Law 439, 444 (1984).

87. Id. at 444, n. 28, 445. See also H. Lovell & T. Carter, Collective Bargaining in the Motion Picture Industry 9, Institute of Industrial Relations - Univ. of Calif., Berkeley (1955).

88. See Hawlicek and Kelso, supra, note 86, at 445.

89. Id.

standard agreement that the producer will transfer ownership of performance rights in the music made for hire to the composer and/or music publisher.^{90/} ASCAP and BMI were to administer the collection and distribution of performance royalties.

Composers continued to negotiate through the CLGA to achieve partial ownership of copyright in their works. During negotiations for a new minimum agreement in 1971-1972, composers were particularly interested in obtaining the right to exploit their music apart from the movie or television production for which it was initially composed. When AMPTP refused to consider giving the composers partial ownership of the copyright for such purposes, negotiations broke down and the composers went on strike. When the strike proved ineffective,^{91/} composers turned to the courts. They brought a class action antitrust suit against the sixteen largest television and film production companies in Bernstein v. Universal Pictures, Inc.^{92/}

In the Bernstein litigation, composers argued that the standard terms contained in their labor agreement constituted a restraint of trade because they had the effect of depriving the composers of all rights in their works. They could only win their case by asserting that they were in fact independent contractors, and that the labor agreement was not subject

90. See 744 F.2d at 930.

91. The strike was ineffective both because composers had limited financial means and because the producers had no pressing need for their services. The producers owned an enormous inventory of music that the composers had already written, which enabled them to continue film and television program production without the services of the composers.

92. 379 F.Supp. 933 (S.D.N.Y. 1974), rev'd, 517 F.2d 976 (2d Cir. 1975).

to the labor union exemption to the antitrust laws.^{93/} For litigation purposes, the composers demonstrated that they no longer worked on the staffs and on the physical premises of the television and film studios, that they provided their own supplies and equipment, and that they worked without direct supervision from the producers. The composers submitted affidavits attesting that they were not "employees" under labor law.

The Bernstein case was settled in 1979.^{94/} Though composers won the right to exploit their future works in markets outside film and television,^{95/} it later became evident that they lost their right under labor law to union representation. Motion picture and television producers in 1979 refused to bargain with the CLGA, and now refuse to bargain with the new Society of Composers and Lyricists.^{96/} Nor do composers' future prospects for regaining union status look bright. The National Labor Relations Board's Regional Director ruled in 1985 that film and television composers are not eligible to be represented by a formal union, because they are independent contractors and not employees.^{97/}

As their situation now stands, because of their posture in antitrust litigation, composers lost their right to bargain through a union in the future. This right was very important to composers when, after the

93. Hawlicek and Kelso, supra, note 86, at 442-3. For a brief history of the litigation see id. at 448, n. 43.

94. Bernstein v. Universal Pictures, Inc., 72 Civ. 542-CLB (Apr. 10, 1979) (Brieant, J.) (Memorandum and Order Confirming Settlement).

95. For a description of the specific terms of the settlement see Hawlicek and Kelso, supra, note 86, at 449-454.

96. See Sobel, supra, note 42, at 5.

97. Id.

district court's decision in the Buffalo Broadcasting case, it appeared that composers might lose their ability to collect performing rights royalties through ASCAP.^{98/} That danger, and composers' urgency for union representation, subsided when the Second Circuit reversed the district court in Buffalo Broadcasting. But if source licensing legislation passes in Congress, composers' lack of union status will diminish their bargaining power in any subsequent negotiations with producers.

II. THE PROPOSED SOURCE LICENSING LEGISLATION

A. Purpose of legislation.

Although local television broadcasters have long tried to get courts to rule against blanket licensing (the prevalent system of licensing music performance rights), the source licensing bills^{99/} mark the first attempt to change this system by legislation. S. 1980 specifically responds to local broadcasters' complaints; it is designed to change the balance in the licensing of these rights by amending the Copyright Act to prohibit the conveyance of the right to perform publicly syndicated television programs without conveying the right to perform accompanying music.

The source licensing bills are grounded on the premise that source licensing is not now available to local broadcasters despite the contrary finding of the Second Circuit in Buffalo Broadcasting Company v.

98. Id.

99. H.R. 3521, the House bill, covers "audiovisual works," but the original Senate bill covered "television transmission." The star print version of the Senate bill adjusts this difference. This statement discusses only the star print of S. 1980.

American Society of Composers, Authors and Publishers.^{100/} Senator Kerry characterized the source licensing bill as "a fairer and more logical method of arriving at a mutually acceptable license fee ... by replacing the current blanket copyright with a 'source licensing' system."^{101/}

B. Major Provisions.

S. 1980 proposes to amend title 17 of the United States Code by adding a new section between 112 and 113.

1. Prohibition of transfer of performance right without the right to perform the accompanying music. The proposed new section designated §112A states:

... no owner, assignee, or licensee of a copyrighted audiovisual work may convey the right to perform publicly such work by a non-network commercial television broadcast without simultaneously conveying the right to perform in synchronization any copyrighted music which accompanies such audiovisual work.

The proposed subsection requires all syndicators who license programs to nonnetwork commercial television stations to convey the right to perform the copyrighted music on the soundtrack of these programs at the time they convey other rights in the programs. As discussed in Part I of this statement, the program producers do not necessarily own the right to perform nondramatic music publicly; that right is ordinarily held by a composer and/or music publisher, who may or may not be a subsidiary of the program producer.

100. 744 F.2d 917, 929-932 (1984).

101. Cong. Rec. S 17986, S 17987 (daily ed., Dec. 18, 1985).

This proposed prohibition of the conveyance of one right without the conveyance of another would be unique in copyright law; it goes against the concept of the divisibility of copyright, explicitly recognized in the 1976 Act. Section 106 of the 1976 Act sets out the exclusive rights enjoyed by the copyright owner and §201(d)(2) recognizes divisibility:

Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

The House Committee Report emphasized that this provision means "that any of the exclusive rights that go to make up a copyright, including those enumerated in section 106 and any subdivision of them can be transferred and owned separately."^{102/}

Although the proposed new "limitation" on the exclusive rights enjoyed by a copyright owner begins with the same provision found in existing limitations,^{103/} the proposed "limitation" is different in that it represents a prohibition on a grant of rights in contrast with existing limitations which partially affect the exercise of rights, generally in narrow terms. S. 1980 would require the syndicators to license all rights at the same time. Consequently, the syndicator has to acquire the performance rights in all music that accompanies the program to be syndicated before the syndicator can license the program for local broadcasters.

102. H. Rep. No. 1476, 94th Cong., 2d Sess. 123 (1976).

103. "Notwithstanding the provisions of section 106 . . ."

Although some syndicators may already control both rights, others will either have to acquire the performance right or remove the music from the program.^{104/} Before enacting this requirement, Congress should consider what the effect will be on the exclusive rights set out in §106 and the divisibility concept found in §201(d)(2).

2. Definition of audiovisual work. Proposed subsection (b) defines "audiovisual work" for purposes of the new §112A as "any motion picture, prerecorded television program, or commercial advertisement." This definition effectively covers all kinds of prerecorded programs that might contain accompanying music. If the source licensing legislation passes, local broadcasters will apparently only need to go to the collecting societies to license performance rights for live performances or programs they produce locally.

3. Retroactivity. Section 2 of S. 1980 provides that the provisions of section 1 "shall not apply for a period of up to one year after such date in the case of a public performance, authorized between the date of enactment and the date one year after such date of enactment, by a contract executed prior to the date of enactment." Thus, the bill purports to grant a one year transition or grace period to the program producers with respect to any contracts covering public performance rights that were executed prior to the date of enactment. If the source licensing provision is intended to affect preexisting contracts once the grace period passes, it is doubtful that the language of §112A(a), which seems to affect only future conveyances, is consistent.

104. Music is apparently being stripped now from some movies before they are put on music video formats.

The bill presents two separate retroactivity issues. The first concerns the intended effect on preexisting contracts. The second concerns the huge inventory of movies and television programs, which the bill clearly affects at least with respect to future conveyances.

Contracts now covering rights in motion pictures containing music may run from three to seven years on the average, and sometimes longer, but the transition period provided in S. 1980 is for only one year. If the bill retroactively affects existing contracts, this grace period is clearly not sufficient as a transition to a new licensing system.

In principle, retroactive legislation is to be avoided since it involves a high risk of being unfair.^{105/} Furthermore, through the Fifth Amendment, Congress is prohibited from passing laws that impair the obligation of contracts.^{106/} There does not appear to be any overriding reason to invalidate the private contracts that are not protected by the proposed one year grace period. Consequently, if Congress chooses to enact S. 1980, it should clarify that the legislation does not affect existing contracts and it should consider making the legislation apply only to movies, television programs, and commercials created in the future. The disadvantage to making the legislation prospective is that the blanket license might remain the preferred mechanism to pay for the performance right for preexisting programs.

105. 2 SUTHERLAND, STATUTORY CONSTRUCTION §41.02 (4th ed. 1973).

106. *Id.* at §41.03.

III. CONSIDERATION OF THE ARGUMENTS FOR AND AGAINST SOURCE LICENSING

A. Open marketplace criteria.

Proponents of S. 1980 urge that source licensing will improve marketplace conditions for the licensing of music performing rights by preventing the abuse of the monopolistic powers that broadcasters claim the licensing societies now exert. Proponents allege that local broadcasters have almost no bargaining power under the existing system since the rights in question are controlled by two giants^{107/} and local broadcasters cannot negotiate in an arms length transaction with such super powers. Furthermore, they praise S. 1980 as providing the leverage by which local broadcasters can negotiate for the rights they use instead of being forced to purchase a blanket license that covers all available works.

Opponents respond that the marketplace is already open, that the courts have already found broadcasters' complaints to be invalid, and have held that blanket licenses do not violate anticompetition laws.^{108/} Proponents answer that S. 1980 corrects the court's "faulty" reasoning by amending the 1976 Copyright Act to make it clear that Congress will not tolerate the use of copyright to justify anticompetitive behavior.

To assess these marketplace arguments we must first look at the antitrust law. From a purely antitrust perspective, the blanket license is clearly a tie-in sale, or a tying arrangement, that in another, unsupervised, context, would violate the Sherman Act. But the blanket license is not unsupervised. The District Court for the Southern District of New York scrutinizes its operation closely and continuously. If ASCAP

107. ASCAP and BMI are said to control the rights to 95% of all of the music in syndicated programs.

108. See text pp. 13-22 supra.

abused its monopoly by charging monopolistic prices, or by refusing to deal, the court would pounce on them. They know that, and the broadcasters know that. So we have seen reasonable rates and minimal court intervention under the blanket licensing system.

There are two other points that should be considered in evaluating the condition of the marketplace issue: assessment of bargaining power, and availability of choices.

1. Assessment of bargaining power. Broadcasters have complained that they have no bargaining power. Opponents point to the fact that the blanket license fee has been periodically negotiated and the rate has gone down steadily since 1949 as proof that local broadcasters have equal bargaining power and that there is no need for Congress to act to change this balance. Opponents also point out that broadcast stations are profitable, influential entities, and, since they bargain collectively as an industry with the performing rights societies, their bargaining power is at least equal, if not superior. Although the parties seem to disagree on who has bargaining power, both sides agree that the fee has gone down consistently.^{109/}

2. Availability of choices. Proponents contend that they are forced to use blanket licensing. Opponents retort that four choices are now available for the licensing of music performance rights: blanket licensing, per program licensing, direct licensing, and source licensing. Opponents of the source licensing bill not only argue that source licensing is now available, but they also stress that broadcasters have made no

109. Opponents claim the rate has decreased from 2.5% in 1949 to 1.15% today.

serious negotiating proposals^{110/} that could lead to source licensing. Moreover, they claim that S. 1980 will be anticompetitive in that it will eliminate all methods of licensing music performance rights except source licensing; it mandates only one way of doing business.

It is not clear how realistic "choice" is under either the current system or the proposed legislation. The first favors blanket licensing through custom and practice; the second mandates source licensing. Recent court decisions suggest that the blanket license is used because it is the customer's preference. Courts have held that broadcasters already have alternatives to blanket licensing.^{111/} Following the Supreme Court's denial of certiorari in the Buffalo Broadcasting case, Les Arries, Chairman of the All-Industry Television Music Licensing Committee, reaffirmed that other alternatives are available to broadcasters.^{112/}

B. Fairness And/Or Effectiveness of System.

1. Reasonableness of Fee. Supporters of S. 1980 insist that the price of the blanket license has no relationship to the amount or quality of the music a local station actually uses. They argue that the blanket license system is not a reasonable or logical fee arrangement since it

110. Of course, it would have made no sense to negotiate while they had the chance to prevail in the courts or in Congress.

111. See text pp. 16-20 supra.

112. These include payments on a per-program basis, a "carve out" of blanket license fees that would work like itemized tax deductions, increased use of library music, and getting publishers to license their catalogs directly to broadcasters. Granger & Ressler, Broadcasting Outlines Licensing Alternatives, Hollywood Rptr. 1, 24 (Feb. 21, 1985).

forces broadcasters to pay for all available music instead of the music they actually use. Furthermore, they claim that source licensing of music performance rights would provide a fairer price for the music used.

Those opposed to the bill insist that the blanket license fee is reasonable, that unlimited access to the licensing society's complete repertoire minimizes transaction costs and is convenient for both user and copyright owner, that it has periodically been renegotiated and adjusted downward, and that it is subject to judicial review under an established rate review procedure by an expert court.

2. Intended Beneficiaries. Proponents of S. 1980 insist that the blanket licensing system does not reward the creators of music but permits double payments to program producers who have music publisher subsidiaries, and that these producers and their subsidiaries are the primary beneficiaries of the system. Since the publisher-subsidiaries are members of the licensing societies, the producers through their subsidiaries receive one-half of the performance rights royalties. Proponents also note that there is no reason why future contracts cannot provide that individual composers receive a share of the direct payments to the studios for any music subject to source licensing.

On the other side opponents insist that passage of the bill will have a devastating effect on both publishers and individual composers. They contend that source licensing destroys the composer's right to continued payment for continued performance while the blanket licensing system is based on the continued payment of royalties to composers. Therefore, they argue that source licensing will deprive composers of deserved income. Opponents assert that there is no valid marketplace value for music before performance (and hence producers will generally not be

willing to pay increased money up-front to composers). They also contend that even if producers were willing to consider deferred or residual payments to composers to assure their compensation for the continued performance of their works, producers will be unable to get a better price for their programs based on the cost of the music from a television station because the station will be in the "driver's seat" in any negotiations constrained by statute to one method of licensing. Opponents conclude that under source licensing, unknown composers will receive a low one time payment regardless of the later popularity of their music.

Although proponents of the bill have suggested that composers could get payments for the continued use of their work, the emergence of residual payments is not realistic at this point. Even if some kind of continued payment might emerge, there is the danger that it would only be granted to more powerful composers. Given that existing residual payment systems resulted only after hard bargaining by artists' craft unions, it seems unlikely that film/TV composers, who have lost the right of union representation (as discussed earlier), will be able to bargain effectively with program producers -- except for the most famous composers. Apparently S. 1980 would, therefore, cut off composer's rights to continued payments for continued performance without guaranteeing them a better initial payment.

3. Distinction Between Motion Picture Theatres and Television Stations. Local broadcasters say they seek the same treatment as motion picture theatre owners who pay one rental fee to cover all of the rights of the studio in the movie, including the music performance right. Opponents respond that there are legitimate reasons to treat television stations differently. They note that theatrical exhibitors pay a rental based on

every performance of the movie and that they now pay a much higher fee for the combined synchronization and performance rights than broadcasters pay for the synchronization right.^{113/} Furthermore, they argue that S. 1980 will force the program producers to acquire rights they do not need; consequently, these producers will not be as willing to license the synchronization right for as little as they do now.^{114/} Opponents also point to the substantial difference in production lead-time: film production extends over months or years, whereas many TV programs are produced within a few days of broadcasting, or the same day as they are broadcast; this factor clearly makes clearance of rights more difficult for TV programs. Finally, opponents argue that the court-mandated source licensing of theatrical exhibition of films occurred when ASCAP was less rigorously regulated than now, and they contend that this source licensing is an anomaly in the entire world of copyright -- in virtually every other country, copyright owners receive fees for theatrical exhibitions from theatre owners. Opponents contend that this difference in motion picture licensing practices has already presented negotiating problems for U.S. performing rights societies: foreign societies have been reluctant to pay U.S. societies a full share of the royalties from theatrical exhibition abroad. If S. 1980 passes, the negotiating position vis-a-vis foreign societies may be substantially undermined. U.S. copyright owners generally do not have a fixed right to obtain all royalties flowing from performance

 113. Sobel notes that the synchronization right may sell for only \$50 to \$500 per composition while the synchronization and performance rights for theatrical motion picture exhibition may cost \$750 to \$20,000 per composition, The Music Business and the Sherman Act: an Analysis of the "Economic Realities" of Blanket Licensing, 3 Loyola Ent. L.J. 1, 48 (1983).

114. Id.

of their music abroad; what our copyright owners receive depends greatly upon the reciprocal agreements negotiated between U.S. and foreign societies.^{115/} Reciprocity is the key word.

4. Stability of Marketplace. Opponents of the source licensing legislation maintain that the present system provides a simple and efficient way to license music performing rights and that this system is working well. They urge that S. 1980 will cause chaos: it will upset existing contracts, disrupt a long-standing and efficient system, and wipe out the livelihood of thousands of composers. They note that costs to initiate a new system will be high and enforcement of rights under a new system will be difficult.

Opponents of S. 1980 claim that passage of the bill will harm the entire blanket licensing system. This harm may occur on both the domestic or international level. On the domestic level, it is clear that if local broadcasters succeed, networks and pay television will also want source licensing. If they in turn succeed, the performing rights societies will be much weaker than they now are and will thus be less effective in protecting composers' rights.

Local broadcasters counter that the system is not working well and that indeed they have fought the existing system for thirty years. They argue that it will be no more difficult to negotiate for and clear the music performance rights in advance than any other copyrights involved in the program. Moreover, they insist that only a small percentage of

115. In 1985 alone one collecting society, ASCAP, collected \$30,425,000 from foreign societies. 49 Cashbox 5, 36 (March 1, 1986).

composers will have to do business differently since the majority of royalties for blanket licenses of television music go to a relatively small percent of ASCAP or BMI members.

C. Public Policy Arguments.

1. Quality of Music. Proponents of S. 1980 argue that passage of the bill will improve the quality of music on syndicated programs by instituting a system that pays more for good music than bad. Payment for specific music used will provide an incentive for producers to improve the quality of music on television.

Opponents reply that the change will make producers absorb some of the cost, and will force producers to take bigger risks, and that producers will retaliate by using less music, cheaper music, or music that is already in the public domain. They emphasize that the present system encourages producers to use significant amounts of quality music.

2. Quality of Programming. Local broadcasters maintain that the money currently expended on "inflated" prices for music performance rights can be rechannelled into local news, public affairs, and commercial programming. Opponents assert that local broadcasters are already making huge profits and thereby imply that these profits could be channelled into better programming, if broadcasters really wanted to produce more of such programs. Any broadcaster savings from lowered music costs will arguably be returned to the stations' ownership.

IV. COPYRIGHT OFFICE CONCLUSIONS

Enacting a legislative fiat that proclaims "Let there be source licensing" is not clearly a fair or wise solution to the long-standing dispute over performance rights between the producers of syndicated programs and performing rights societies on the one hand, and those who purchase these programs for local broadcast. Proponents of S. 1980 may be right when they say that they cannot readily achieve source licensing at this time, but it also seems true that they have not made a serious effort to negotiate source licensing or to explore other alternatives to the blanket license. S. 1980 will not only ensure that broadcasters get source licensing, but it will also undoubtedly mean that they pay less for music performance rights than they do under the blanket license.

Those producers who have music publishing subsidiaries may get enough additional money from local broadcasters under a source licensing system to offset the loss of blanket licensing royalties. Music publishers who are not affiliated with program producers and composers are likely to suffer significant losses in income if this bill passes. Even if the number of composers involved is smaller than the opponents of S. 1980 claim, however, the Copyright Office is particularly concerned about the plight of these individual composers. Composers may not get all they deserve under the blanket licensing system, but they do continue to receive at least 50% of the royalties even when the copyright is assigned to the publisher or the producer. Proponents of S. 1980 have alleged that composers could do as well or better under the source licensing system. We are not convinced that this is true.

Composers established the right to an assignment back of performance rights in music when they had a union bargaining for them. Composers no longer have unions to protect their rights. The source licensing legislation will take away the royalties paid composers through the blanket licensing system without guaranteeing them any other royalties. Also the source licensing bill does not ensure that the composer will get a better initial payment than under the present system. Under the present licensing system of music performing rights it is clear that an unknown composer gets very little money "up front" -- the unknown may settle for a token payment and screen credit with the knowledge that he or she is guaranteed a percentage of performing rights royalties and that this income may be substantial if the work is successful. Only a few known composers will have the bargaining clout to get a better initial payment.

Obviously both producers and broadcasters prefer to leave the responsibility for continued payment to the composer for music performing rights up to the other party. The Copyright Office believes that the present licensing system should not be changed unless the legislation also protects the composers of television music by mandating some kind of continued payment for the continued use of their work.

The Copyright Office also believes that the burden of showing the unfairness, unreasonableness, or inefficiencies of the present licensing system should rest on broadcasters. The courts have examined the present music licensing system and found that the broadcasters have not shown the present system is unreasonable or anticompetitive. To the contrary, the

Supreme Court found that the blanket license results in "substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers ..."116/

In effect S. 1980 attempts to shift the administration and monitoring of performance rights from ASCAP and BMI to the producer-syndicator, but the present bill does not contain any language that spells out responsibilities, rights, or remedies. It is, therefore, not clear what would happen if a producer-syndicator is not able to clear performance rights for music in an audiovisual work that already exists. Keeping an audiovisual work out of syndication could have a drastic economic effect on the producer since syndication is usually essential to recoup costs. Stripping the music that cannot be cleared and replacing it with other music might prove difficult and expensive in many cases, and perhaps not possible in others, in which case the value of the audiovisual work would be destroyed. Who should bear the cost of altering valuable film properties?

For years producers have ceded music performance rights to the composer and the music publishers. In future productions television producers will arguably be able to provide source licensing by retaining performance rights or using other music even though television producers have shorter lead times than motion picture producers. For the existing huge inventory of films and television programs, however, S. 1980 appears to place an unnecessary burden on the producer. If the program has not already been syndicated, S. 1980 requires the producer to convey all performing rights. If the program has already been syndicated section 2 of the proposed bill purports to give only a one year grace period before

116. BMI v. CBS, Inc., 441 US 1, 21 (1979).

public performances come under the bill's sanction. Although it seems to be the intent of the bill retroactively to affect contracts after one year, it is not clear how a court would view this provision since the language in section 112A(a) does not seem applicable to rights already conveyed under a preexisting contract.

S. 1980 is a novel piece of copyright legislation: it would completely wipe out the blanket licensing system for syndicated television programming -- this might eventually spread to the entire blanket licensing system. Moreover, it calls into question two established legal principles, the "divisibility of copyright" and the "sanctity of contracts." The Copyright Office is concerned about the wisdom of passing such a drastic measure at this time since other competitive licensing alternatives are apparently available. Even now the District Court for the Southern District of New York is reviewing the reasonableness of the ASCAP rates for performance of music by broadcasters.

The Copyright Office believes the courts are the appropriate mechanism for review of the reasonableness of the blanket license and per-program license rates. The privately-negotiated blanket license has existed for 70 years, has been subjected to the most intensive judicial scrutiny for its reasonableness and competitive effects, and has been found to be a practical necessity that benefits users and copyright owners. As the Supreme Court has found:

ASCAP and the blanket license developed together out of the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers....

A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided.^{117/}

Thank you. My colleagues and I would be pleased to respond to your questions.

117. 441 U.S. at 20.

RESPONSES OF RALPH OMAN TO WRITTEN QUESTIONS SUBMITTED
BY SENATORS MATHIAS AND THURMOND

1. The proponents of S. 1980 have noted that although section 106 of the copyright act grants several exclusive rights to the creator of a copyrighted work, section 107-118 of the act place various restrictions on those exclusive rights. Do you believe that S. 1980 falls into the type of exceptions covered by these sections of the act? Would S. 1980 serve the public interest in a way similar to these other exceptions?

No. S. 1980 does not fall into the type of exceptions covered by §§107-118. Those exemptions are generally narrow in scope and benefit primarily nonprofit or educational users, or where a commercial user benefits, a compulsory license has been created that assures the copyright owner of at least some compensation for the exercise of the particular right. On the other hand, S. 1980 is a legislative prohibition on conveyance of one right without conveying another right; it works a statutory bundling or tie-in of rights that could otherwise be marketed separately. It would be a unique legislative provision unlike the exemptions and exceptions now found in the law.

S. 1980 would serve a private interest by permitting local broadcasters to get performing rights for less money; it does not appear to serve any public interest analogous to the exceptions in sections 107-118 of the Copyright Act.

2. Do you believe that passage of S. 1980 would improve conditions for American composers in the market place? Would it in your opinion increase or decrease their income? Do you believe the legislation makes any improvement in the copyright system?

It is difficult to imagine how S. 1980 could improve conditions for American composers. For every local composer who might get a job under a source licensing system, several other composers would lose opportunities to create music when producers used less costly or merely less music. The Copyright Office does not believe that source licensing would increase composers' income; moreover, the Copyright Office doubts that composers would be as well off under a source licensing system. Most composers simply lack bargaining power. They are unrepresented by a labor organization. The blanket licensing system represents a way for composers to administer their rights collectively that increases their bargaining power, or at least allows

them to maintain the 50/50 split of royalties that has been customary for several decades. The other parties to this legislative issue--the local broadcasters and the program producers--are generally well able to take care of themselves in negotiations. Furthermore, I am not persuaded that the broadcasters need the assistance of the Congress to negotiate reasonable performance fees for TV music. I do not see any improvement to the copyright system in general. To the contrary, the departure from the principle of divisibility of rights is troublesome.

3. Do you believe that the changes mandated by S. 1980 would bring any response by our trading partners with regard to the way they now compensate American citizens for copyrighted music used in their countries?

The risk of a negative response seems substantial. American music is very popular abroad, so foreign collecting societies undergo administrative expenses to collect and administer rights in U.S. music, knowing that they will pay large amounts of royalties to U.S. collecting societies. Complaints of lack of reciprocity have been registered under the present system because U.S. societies cannot collect royalties for performance of foreign music (or any music) in U.S. movie theaters, and yet the foreign societies collect and pay for the use of American music in foreign theaters. If television is now subjected to statutory source licensing, foreign performing rights societies will likely retaliate and refuse to collect or pay for American music on foreign TV. Unlike U.S. movie theaters, European movie theaters (and those in most foreign countries) obtain blanket licenses to perform music from the performing rights societies. Television and radio stations also obtain blanket licenses from performing rights societies. The balance of trade strongly favors the United States. In 1985 alone one U.S. performing rights society (ASCAP) collected more than \$30,000,000 from abroad, and paid approximately \$17,000,000 to foreign collecting societies. I do not have figures from the other two U.S. societies but I believe their income from foreign sources would only increase the "trade" surplus.

4. Do you believe passage of this legislation would have any impact on United States entry into the Berne Union?

It could have an indirect but nonetheless significant effect in that dilution of U.S. copyright protection at a time when the United States is considering entering a Union that on the whole offers a higher standard of protection could lead to a backlash or resistance from groups who may already feel that what the U.S. is willing to do to enter Berne is not enough. The Berne Convention does not, however, specifically require divisibility of copyright, although its underlying philosophy favors it.

5. The Copyright Office was deeply involved for nearly twenty years in the revision process that culminated in the 1976 Copyright Act. Was any proposal to require source licensing considered during that process? If so, can you describe why it was rejected? Has this proposal been before Congress prior to the 99th Congress?

Not to my knowledge. Source licensing has been discussed in litigation, but this is the first time the proposal has been put before Congress.

THURMOND QUESTIONS

1. Testimony was offered that the blanket license system was developed as an appropriate and necessary means of administering license rights for random uses of music such as in radio broadcasting, nightclubs and, in the early days, television programming. Today the music in our syndicated shows are dubbed onto the soundtrack before the tape is ever sold to stations. Why, then, should the outdated blanket license system continue to be used in syndicated programming?

The Copyright Office believes that the blanket licensing system is not, in fact, outdated. Ever since its inception, the blanket licensing mechanism has been important for more than just its "safety net" value for music users who spontaneously perform copyrighted musical compositions. The blanket license is enormously convenient for composers, music publishers, and music users, and the performing rights societies provide a very important policing service for their members and affiliates. The Supreme Court in the CBS litigation found that the blanket license achieves an efficient integration of sales, monitoring, and enforcement of performing rights in television music notwithstanding that music is prerecorded onto the soundtrack of television programming.

The blanket licensing system now in place effectively compensates music composers for the continuing use of their creations by television stations. It is unclear whether the source licensing system that would develop pursuant to passage of S. 1980 could accomplish as much for composers. The Copyright Office believes that the present licensing system should not be changed unless the legislation also protects composers of television music by mandating some kind of continued payment.

2. What is the justification, if any, for using source licensing for movies and not for syndicated television programs?

The music performing right for exhibition in movie theatres is cleared at the source by the movie producer because of a judicial decision in the late 1940's applying the antitrust laws--not because of copyright policy. That decision held that ASCAP's operation of the blanket license for the public performance of musical compositions in movie theatres violated federal antitrust laws. To enforce the decision, the court ordered composers to license the right of public performance in their musical compositions to the motion picture producers to whom they grant synchronization rights in those compositions. That order did not extend to the newly operating television stations that existed at the time, and after the decision the blanket license was reformed and regulated more strictly by the Justice Department. Thus, since the late 1940's, the licensing practices of the television and the motion picture theatre industries have developed in different directions.

From the producers' perspective, there are several differences in making feature films and television programming that affect music licensing. Today theatrical exhibitors pay movie producers a rental fee for motion pictures that is based on the revenue the exhibitor receives for every ticket sold to the particular movie while television stations negotiate a lump sum payment for the right of unlimited performance of syndicated programming. Thus, movie producers are in a different bargaining position with respect to each of the two industries. Furthermore, producers' budgets are much larger for feature

film production than for the risky production of a television pilot, so producers are able to pay composers of music for feature films a much larger up front fee for synchronization rights and performing rights in their creations than they pay composers of music created for television programming. Lastly, there is a substantial difference in production lead-time of feature films and television programming. The relatively short lead-time of television program production might affect a producer's ability to secure source licensing for all the music used in a particular television program.

Today the source licensing of theatrically exhibited films practiced in the United States is a copyright anomaly. In the rest of the world, copyright owners receive fees for theatrical exhibitions from theatre owners. This difference in the U.S. copyright law has already presented negotiating problems for U.S. performing rights societies; foreign societies have been reluctant to pay U.S. societies a full share of performance royalties from theatrical exhibition of U.S. films abroad, since foreign composers are not compensated for the performance of their works in U.S. theatres.

3. You testified at the hearing that under S. 1980 the composer may have difficulty determining when and where his music is played. What are your reasons for anticipating such an enforcement problem?

Under the blanket licensing system, performing rights societies periodically survey the programming broadcast on local television stations across the nation. The societies use the data collected to apportion the royalties collected from the television stations among all the composers whose works were actually performed. If a society finds that a television station performs a member composer's works without a license, the society will initiate legal action against the infringing station to enforce the member composer's copyright.

Under a source licensing system, however, producers obtain performing rights directly from composers, and the composers would have no agent to monitor where or how often their works are being broadcast. Therefore, if a producer fails to clear performing rights in a composer's works, the composer has no way of discovering that his or

her works are being performed by local stations. This problem would be particularly problematic for composers whose works are used as "outside" music in a particular program. Such works are created prior to the production of a program, so the producer may not be able to identify or locate the composer or other owner of the performing rights in the work. The problem would also arise if a composer for hire or a composer under an independent contracting arrangement establishes the right to receive a residual, since such composers would have no way to monitor the number of performances of their work occurred and thus calculate the residual they are owed by the producer.

Senator MATHIAS. We now have five panels of witnesses representing various parts of the industry. We have about 90 minutes for the five panels so I enjoin brevity upon each of the witnesses.

We will start with Mr. Les Arries, the All-Industry Television Station Music License Committee in New York; Mr. Edward O. Fritts, president of the National Association of Broadcasters; and Mr. Preston Padden of the Association of Independent Television Stations.

Mr. Arries, do you want to begin?

STATEMENTS OF PANEL CONSISTING OF LES ARRIES, JR., ALL-INDUSTRY TELEVISION STATION MUSIC LICENSE COMMITTEE, NEW YORK, NY; EDWARD O. FRITTS, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS, WASHINGTON, DC; AND PRESTON R. PADDEN, ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, WASHINGTON, DC.

Mr. ARRIES. Yes, Mr. Chairman. Good morning, Senator Mathias, and members of the Senate Copyright Committee.

I am Les Arries, Jr., I am chairman of the All-Industry Television Station Music License Committee, which represents more than 800 local television stations. I have been chairman for more than 14 years. This year I will complete 40 years in television. I started here in Washington at WXWT, now WTTG. I have worked for the DuMont Television Network, CBS, the Boston Herald Traveler Station, WHDH-TV, Westinghouse Broadcasting, and the Buffalo Evening News stations, WBEN, AM, FM, and TV.

I started in television as an engineer, have been a director, a producer, a program operations manager, a network director, assistant director of programming and production for the DuMont Television Network, general manager of six stations, a sales representative for CBS Television, president of Westinghouse Productions which produced the Mike Douglas and Merv Griffin shows, and president of the company syndicating those programs and others. Finally, I have been and am president and CEO of stations in Buffalo, NY, and Columbus, OH. I have put four television stations on the air.

I give you that background of 40 years in this business of broadcasting so that you may know that my experience is varied and broad.

I would like to start today by assuring you that we broadcasters want to pay fairly for the music being used on our television stations. Others will suggest differently. It just is not so.

We are here today as a court of last resort in the hope of convincing you of the unfairness and abuses which have characterized the licensing of music for local television stations over the past 30 years. We ask that you pass S. 1980, which provides a straightforward, workable, and just solution to our problem.

Others you will hear from will attempt to persuade you otherwise on all of these scores. They will, for example, say that there is no need for this law because the broadcaster has a wide range of licensing options if he is unhappy with the blanket license. Most commonly it is said that a broadcaster need only make a "serious" request of its syndicated program supplier—"just ask," they say—and the source licensing of music performing rights will be forthcoming.

Senators, I can tell you first-hand that these so-called options do not exist. The producers/syndicators are today in a very enviable position. They have the golden ring and they want this merry-go-round to continue forever. They belong to an exclusive and lucrative club, whose members comprise a small clique of composers and publishers who receive the benefits of the blanket license system. Today, these program suppliers not only call the tune in the lucrative syndication marketplace, but they also receive a back-end kick-back of 50 percent of the royalties paid out by ASCAP and BMI for television performances of background and theme music through wholly owned music publishing subsidiaries.

You will hear from others how our industry has diligently tried to get source licensing. The fact is, it is impossible for a station in Buffalo, NY, Atlanta, GA, Waco, TX, or anywhere else, to get these giant Hollywood producers/syndicators to budge. They do not want to and they do not have to. They would be crazy to act any differently so long as the blanket license remains in place.

What is so inequitable about the current system, Senators, you might ask? Instead of having the value of music performing rights decided in a competitive negotiation between producer and copyright owner, where the value of such rights can be accurately determined, ASCAP and BMI have forever declared themselves the broadcasters' revenue partners. Our music license fees are tied directly to our revenue success. We do not pay for the specific compositions we need and use. We pay for unneeded access to literally millions of compositions. No other creative talent has been allowed by our copyright law to band together in such a fashion and to engage in such a practice. Not television directors, nor television writers, not even television actors. They make their best deals with the producers and, I venture to say, Senators, do very handsomely in many cases. Why should music performance rights be singled out for special treatment?

When the theater operators and owners were in our fix, they won their freedom in a case called *Alden Rochelle*. Unfortunately, when the Justice Department rewrote the ASCAP consent decree,

and with a little help from Mr. Finkelstein from ASCAP, television stations were left holding the blanket license bag, and we have been suffering under that ball and chain ever since.

That the system is out of whack is evident. The television stations, including independents, pay more to ASCAP and BMI than the three television networks collectively, even though the networks produce more programming than all television stations, including independents; have their programming seen in prime time and, in general, use music of greater consequence than do local television stations. We do not just pay more; we pay more than double what the networks pay. And that was for 1985. It could be triple for 1986. And I would like to ask Mr. Oman, for example, if the courts were supervising the rates of blanket license, how could that have happened?

What is the music we are talking about? Let me demonstrate. I hope I can play the right button. [Television program demo.]

That is considered theme music. This is the closing where the theme is repeated. I might say that that theme music would certainly win no Emmy. And the shame about that is that that kind of music gets the same compensation for the same numbers of play as the fine music of Mike Post that you will hear from later on. Mike produced for Miami Vice.

Our local news serves as another example. News is the single most important thing a local television station does. Its success determines the market position for that station. And the news, therefore, directly or indirectly is responsible for the revenue potential of that station. It really does not matter which network the station may be affiliated with. It can be number one in its market if it is number one in local news.

I submit to you that music plays a very minor role in the success of the average local news programs across America. Yet, ASCAP and BMI insist upon their share of the very substantial revenues generated from such programming.

You will hear that we are not hurt by what we currently pay for music. The television stations are being sold for millions and millions of dollars. Senator Gore has already alluded to that. Do not be distracted, please. What we are talking about simply is the value of music to a television program and how to properly determine that value. That is all. Nothing more. The present system insulates music performance rights from the open marketplace, from which users and creators alike are supposed to be entitled to benefit. Users and creators alike.

In conclusion, the blanket license system as applied to the broadcasters' syndicated programming is a system that does not give the free enterprise a chance to work in the open market. "Let the marketplace decide" is a refrain we hear frequently in our dealings with the FCC and others. Is it not time to apply that thought to music licensing for television?

Thank you, Mr. Chairman. That concludes my formal remarks. [Submissions of Mr. Arries follow:]

PREPARED STATEMENT OF LESLIE ARRIES, JR.

SUMMARY

Producer/syndicators who own the copyrights in syndicated television programming are an exclusive club whose few members receive the benefit of the blanket license system.

Producers perpetuate the system because they use their copyright power to receive a 50 cent kickback on every dollar collected by ASCAP and BMI. They receive this money by designating themselves publishers.

Under the present system, music license fees are not negotiated directly between the copyright owner and user. Instead, ASCAP and BMI -- the licensing agents for the studios -- demand a percentage of station revenues in return for a blanket license.

Under this blanket license we must pay for millions of compositions when we only need a few. No other creative element under the copyright act is permitted to engage in such practices.

Under this system we pay for music not on the basis of its value to our program schedule, but on the basis of the success of our entire program schedule, even though many programs which account for that success use little music -- news programs are an example.

What we are talking about is the value of music to a television program, and how to determine that value. Nothing more.

S.1980 would end the current system in which music copyright payments bear no relationship to the actual value of music in local TV production. Under S.1980 the marketplace would determine the value of music.

* * *

Good morning Senator Mathias and members of the Senate Copyright Committee. I am Les Arries, Jr. I am the Chairman of the All-Industry Television Station Music License Committee, which represents more than 800 local television stations. I have been Chairman for more than 14 years. This year I will complete 40 years in television. I started here in Washington at WXWT, now WTTG. I have worked for the DuMont Television Network, CBS,

Boston Herald Traveler Station, WHDH-TV, Westinghouse and the Buffalo Evening News stations, WBEN AM, FM and TV. I started in television as an engineer, have been a director, a producer, a program operation manager, a network director, assistant director of programming and production for the DuMont Network, general manager of six stations, a sales representative for CBS, President of Westinghouse Productions, which produced the Mike Douglas and Merv Griffin shows, and President of the company syndicating those programs and others. Finally, I have been President and CEO of stations in Buffalo and Columbus. I have put four television stations on the air.

I give you that background of 40 years in this business of broadcasting so that you may know that my experience is varied and broad.

I would like to start today by assuring you that we broadcasters want to pay fairly for the music being used on our stations. Others will suggest differently. It just isn't so.

We are here today as a court of last resort in the hope of convincing you of the unfairness and abuses which have characterized the licensing of music for local television stations over the past 30 years. We ask that you pass S.1980, which provides a straightforward, workable and just solution to our problem.

Others you will hear from will attempt to persuade you otherwise on all of these scores. They will, for example, say that there is no need for this law because the broadcaster has a wide range of licensing options if it is unhappy with the blanket license. Most commonly, it is said that a broadcaster need only make a "serious" request of its syndicated program supplier -- "just ask" -- and the source licensing of music performing rights will be forthcoming. Senators, I can tell you first hand that these so-called options do not exist. The producers/syndicators are today in an enviable position. They have the golden ring and they want this merry-go-round to continue forever. They belong

to an exclusive and lucrative club, whose members comprise a small clique of composers and publishers who receive the benefits of the blanket license system. Today, these program suppliers not only call the tune in the lucrative syndication marketplace; they also receive a back-end kickback of 50 percent of the royalties paid out by ASCAP and BMI for television performances of background and theme music -- through wholly-owned music publishing subsidiaries.

You will hear from others how our industry has diligently tried to get source licensing. The fact is, it is impossible for a station in Buffalo, Atlanta, Waco or anywhere else to get these giant Hollywood producers/syndicators to budge. They don't want to and they don't have to. They'd be crazy to act any differently so long as the blanket license remains in place.

What is so inequitable about the current system? Instead of having the value of music performing rights determined in a competitive negotiation between producer and copyright owner, where the value of such rights can be accurately determined, ASCAP and BMI have forever declared themselves the broadcasters' revenue partners. Our music license fees are tied directly to our revenue success. We do not pay for the specific compositions we need and use. We pay for unneeded access to literally millions of compositions. No other creative talent has been allowed by our copyright law to band together in such a fashion and to engage in such a practice. Not television directors, nor television writers, nor even television actors. They make their best deals with the producers -- and, I venture to say -- do very handsomely in many cases. Why should music performance rights be singled out for special treatment?

When the theater operators and owners were in our fix, they won their freedom in a case called Alden Rochelle. Unfortunately, when the Justice Department rewrote the ASCAP consent decree, with a little help from ASCAP, television stations were left holding the blanket license bag and we have been suffering ever since.

That the system is out of whack is evident. The television stations, including independents, pay more to ASCAP and BMI than the three television networks, even though the networks produce more programming, have their programming seen in prime time, and in general use music of greater consequence than do local television stations. We don't just pay more; we pay more than double. That's for 1985. It could be triple for 1986.

What is the music we are talking about? Let me demonstrate.

Our local news serves as another example. News is the single most important thing a local television station does. Its success determines the market position for that station and the news therefore directly or indirectly is responsible for the revenue potential of that station. It really doesn't matter which network the station may be affiliated with. It can be number one in the market if it is number one in local news. I submit to you that music plays a minor role in the success of the average local news program across America. Yet, ASCAP and BMI insist upon their share of the substantial revenues from such programming.

You will hear that we are not hurt by what we currently pay for music, that television stations are being sold for millions, or upon millions of dollars, etc. Do not be distracted please. What we are talking about is the value of music to a television program. And how to properly determine that value. That's all. Nothing more. The present system insulates music performing rights from an open market process -- from which users and creators alike are entitled to benefit.

In conclusion, the blanket license system as applied to the broadcasters' syndicated programming is a system that doesn't give the free enterprise system in an open market a chance to work. "Let the marketplace decide" is a refrain we hear frequently in our dealings with the F.C.C. and others. Isn't it time to apply that thought to music licensing for television?

RESPONSES OF LESLIE ARRIES TO WRITTEN QUESTIONS
SUBMITTED BY SENATOR MATHIAS

QUESTION

1. As Chairman of the All-Industry Committee, you are involved in negotiations with ASCAP, BMI, and SESAC over licensing matters. Your written submission states that there is no incentive to negotiate "source" or "direct" licensing for programs since the blanket license covers all programs and a station doesn't save any money if it secures another licensing arrangement for one or several programs. But isn't it true that the licensing arrangement with BMI previously included such a savings -- a so-called "carve out" provision for programs in which music performance rights were cleared at the source? Why didn't broadcasters ever use this "carve out" provision during the 22 years it was in effect? And, perhaps more importantly, why did the All-Industry Committee insist on removing this provision during the 1972 negotiations with BMI?

ANSWER

In response to Senator Mathias' first question, let me first state that Senator Mathias correctly references my personal belief that there is no strong incentive for individual TV stations to obtain source or direct licenses for music in programs as long as the blanket license system exists, because the blanket license covers all programs and, absent a "carve-out" provision in both the ASCAP and BMI blanket licenses, the effect of obtaining such direct or source licenses would be to require a double payment for music performing rights. The converse is also true. If there were a carve-out provision in the ASCAP and BMI blanket licenses, whereby stations could deduct from the revenue base on which the blanket license fee (which is computed as a percentage of station revenues) is calculated the revenues derived from programs for which the station is able to secure performing rights directly or at the source, then there would be some incentive for stations to seek source or direct licenses since their cost of obtaining such licenses could be offset from their otherwise fixed blanket license costs.

I must note, however, that in spite of the disincentives in the present system which discourage stations from seeking source

licenses, many stations have in fact tried to do so, with little success. Witness the testimony of Storer Communications.

It is not true that prior licenses with BMI afforded local television stations an opportunity to achieve a license fee savings by virtue of such a carve-out provision. While the BMI blanket license form in effect until 1972 did provide (in the definitional section of the license) that the revenue base on which the fee would be calculated did not include revenues from programs in which the BMI music was entirely cleared at the source, this definitional provision did not afford broadcasters any actual opportunity to reduce their blanket license fee costs for two important reasons.

First, as a matter of fact, for the entire time period during which this provision was in effect, BMI obtained from its affiliated composer and publisher members an exclusive grant of television music performing rights. Having granted the exclusive licensing rights to BMI, BMI's composers and publishers did not even have the requisite music performing rights to grant to local television stations -- on a direct, source, or any other licensing basis. The supposed carve-out provision in the pre-1972 BMI local TV blanket licenses was thus totally illusory. For the Committee's convenience, I am enclosing copies of BMI's standard forms of affiliation agreements with its composers and publishers throughout the time period that BMI now asserts that "carve-out" relief was available under its old blanket license. The unequivocal grant of exclusive performing rights to BMI is contained in Paragraph 4(a) of the composer agreements and Paragraph THIRD A of the publisher agreements.

BMI's pre-1972 "carve-out" provision was totally meaningless for a second reason as well: for in virtually all instances, syndicated programs contain both ASCAP and BMI music. **Therefore,**

in the absence of a provision for "carve-out" relief in the ASCAP blanket license, even were a station able to obtain source or direct licenses for a program, it would still be subject to the full blanket license fee to ASCAP plus its additional payments made to secure direct or source licenses. ASCAP has never been willing to offer stations a carve-out provision in its blanket license.

The answer, then, to Senator Mathias' question why broadcasters did not use this pre-1972 provision in the BMI blanket license form is that it was a provision which existed in form only. BMI composers and publishers could not, even if asked, engage in source or direct licensing under the terms of their affiliation agreements with BMI; and, in any event, even if stations had asked and obtained source or direct licenses, they would still have been subject to blanket license fees with ASCAP which would have nullified any incentive to engage in source or direct licensing of BMI music.

In any event, even if the carve-out provision had existed in usable form, there is no way that the producer-syndicators would have had any incentive to source license the music in the stations' syndicated programs. The evidence is clear that there is no interest on their part to deviate from the current system, a system which rewards them handsomely in two ways -- through program syndication fees and through distributions through ASCAP and BMI. As long as the blanket license remains an available licensing technique for them the producers-syndicators will not budge from their insistence that the broadcasters obtain blanket licenses from the societies.

In short, the carve-out may improve incentives on one side of the equation, but it in no way alters the perspective of those on the other side whose willingness is necessary to make source licensing happen.

There is a simple answer to Senator Mathias' question "why did the All-Industry Committee insist on removing this [carve-out] provision during the 1972 negotiations with BMI?" We didn't. BMI has grossly overstated what transpired. In fact, this is what happened. Having already spent years negotiating the new form of the ASCAP blanket license to be effective from 1969-1978, everyone involved agreed that it made no sense to negotiate different terms (other than the license fee rate) with BMI. Thus, the same form of agreement that had been agreed upon with ASCAP was used as well for BMI. There was never a specific reference to the illusory, so-called "carve-out" provision -- or to any other provisions of the prior BMI license agreements -- during the negotiations preceding the 1972 blanket license agreement. Thus, the suggestion that the All-Industry Committee "insisted on removing this [carve-out] provision" is simply wrong. It never came up.

QUESTION

2. Would not use of a "carve out" provision give the necessary market incentive to television stations to license at the source or directly from composers? Have you tried during current negotiations to reinstate this "carve out" provision with BMI or attempted to negotiate a similar arrangement with the other performing rights societies?

ANSWER

As noted, it is my belief that if there were a carve-out provision in the ASCAP and BMI blanket licenses, pursuant to which television stations could deduct from the revenue base on which their ASCAP/BMI blanket license fee is computed those revenues derived from programs for which source or direct licenses to the music are obtained, there would indeed be some incentive for stations to seek source or direct licenses. In recent years, we have repeatedly sought from both ASCAP and BMI a license provision which would enable stations to "carve-out" such revenues from the blanket license revenue base, and therefore

would enable stations to reduce their blanket license fee payments by virtue of having obtained music rights directly or at the source.

ASCAP and BMI have uniformly refused. The subject most recently came up in negotiations between the parties immediately following the trial court decision in Buffalo Broadcasting and before the trial court judgment was entered. The stations requested that continuing blanket licenses contain a carve-out provision which would give stations incentive to engage in direct or source licensing; but ASCAP and BMI refused. Indeed, it was only over ASCAP and BMI's objections that the potential for "carve-out" relief was provided by the district court in the Buffalo Broadcasting case. WVLI (F) of its judgment, which provided that stations would be permitted to file an application for a reduction in interim blanket license fees based on a showing of their having obtained source of direct licenses; (a copy of the district court judgment is enclosed for the Committee's convenience.^{1/} Unfortunately, with the reversal of the district court judgment by the Second Circuit, this potential carve-out provision was negated.

ASCAP's and BMI's unwillingness to provide local stations with a blanket license "carve-out" provision was confirmed again in the All-Industry Television Station Music License Committee's

^{1/}For the Committee's information, a group of seven television stations owned by Storer Communications, Inc., ("Storer") acted upon the incentive created by this provision of the district court judgement. Storer's stations obtained source or direct licenses for virtually all their locally-produced programming, and applied to the district court for a reduction based on the "carve-out" provision of the district court judgement. Storer continued to face uniform producer/syndicator refusal to grant source licenses for its syndicated programming; therefore, no fee reduction was able to be sought in relation to the syndicated program portions of the Storer stations' program day. A copy of the Storer application is enclosed for the Committee's convenience. The Second Circuit decision overturning the district court judgment occurred before any decision was rendered on the Storer application, and rendered that application moot.

negotiations with ASCAP and with BMI held after the conclusion of the Buffalo Broadcasting case. Should the Committee have any question about ASCAP's and BMI's unwillingness, I would respectfully request that the Committee ask both Mr. David and Mr. Cramer the following question: "Would you be prepared today to offer local television stations a blanket license in the same form and at the same rate at which it is currently offered which also included a provision to the effect that the revenue base on which the blanket license fee is calculated would not include revenues derived from programs in which the music performing rights are cleared directly or at the source?"

As noted, however, a "carve-out" provision is far from a total solution to the problem faced by the local television stations. For, as the Storer petition reflects, it can only provide relief with respect to the cost of music in a station's locally-produced programs. As long as producers and syndicators refuse to provide source licensing for the music in syndicated programs, the stations will continue to have no alternative but to take the ASCAP/BMI blanket licenses to cover the music in such syndicated product.

QUESTION

3. Mr. Arries, this bill is a response to the decision in the Buffalo Broadcasting case. After that lawsuit, you were quoted in the February 21, 1985 issue of THE HOLLYWOOD REPORTER as saying that there were other options available including "a rigorous presentation of the industry's licensing circumstances in the so-called federal 'rate court,' which is empowered to set 'reasonable' license fees under ASCAP's government consent decree and, if need be, before the Department of Justice which oversees that decree." If you believe the fees your member stations are now paying are unreasonable, why are you seeking legislation solutions? Doesn't a federal court stand ready to hear your complaints? In such a proceeding, isn't the burden of proof on ASCAP to prove that the fees are ~~reasonable~~? Have you tried these alternatives?

ANSWER

To be sure, after failing to achieve relief in the Buffalo Broadcasting case, our industry was not prepared simply to accede

to ASCAP's demand for increased blanket license fees which would generate in excess of \$100 million in licensing revenue to the two major societies in 1986 and ever-greater sums thereafter. It would not have been responsible for the Industry Committee, of which I am Chairman, not to seek such relief as might be available through a judicial "rate court" mechanism. If our industry was to be relegated by the courts to blanket licenses, then it is self-evident that we would want those licenses priced at the fairest levels attainable. But to say that that was an objective is not to say that S.1980 is unnecessary. The rate court cannot give the broadcasting industry what it has sought for 30 years and deserves -- an opportunity to acquire music performing rights through a competitive market mechanism which operates in the same manner as all other program elements are acquired and paid for by the broadcasters.

The rate court can take a stab at determining "reasonable" license levels, but there are no standards governing the proceedings in that court and that mechanism, at best, represents a substitution of an artificial, judicially-regulated mechanism for the operation of a market mechanism which can function smoothly and efficiently.

All of the other options to which I referred to in The Hollywood Reporter article expressly dealt with trying to solve one small piece of the broadcasters' problem, namely, enabling broadcasters to control their music destiny with respect to music on their locally-produced programs. There is, however, no prospect for the broadcasters, short of legislative assistance, to be freed of the chains of the blanket license as it wraps itself around the music in our syndicated television programming. As to that inequity, no alternative within the control of the broadcasters can bring about meaningful change.

SAMPLE OF BMI--PUBLISHER AFFILIATION AGREEMENTS

EXHIBIT 12B/ID



(1969) - 8 4834 3/69

AGREEMENT made this _____ day of _____, 19____, between
 BROADCAST MUSIC, INC., a New York corporation, whose address is 589 Fifth Avenue, New York, N. Y. 10017;
 (hereinafter called "BMI") and _____
 a _____ corporation _____ doing business under the
 firm name and style of _____ whose address is _____

(Street or Avenue) (City) (State) (Zip)
 (hereinafter called "Publisher").

WITNESSETH:

FIRST: The term of this agreement shall be the period of five (5) years from _____
 to _____, and continuing thereafter for additional periods of five (5) years each
 unless terminated by either party at the end of such initial period, or any such additional five (5) year period, upon
 at least three (3) months' notice by registered or certified mail.

SECOND: As used in this agreement, the word "works" shall mean:

A. All musical and dramatic-musical compositions, whether published or unpublished, now
 owned or copyrighted by Publisher or in which Publisher owns or controls performing rights, including but not
 limited to the compositions listed in Schedule A hereto, and

B. All musical and dramatic-musical compositions, whether published or unpublished, in
 which hereafter during the term Publisher acquires ownership or copyright or ownership or control of the performing
 rights, from and after the date of the acquisition by Publisher of such ownership or control.

THIRD: Publisher hereby sells, assigns and transfers to BMI, its successors or assigns, for the term of
 this agreement:

A. All the rights which Publisher owns or acquires publicly to perform, and to license others to
 perform, for profit or otherwise, anywhere in the world, any part or all of the works, such rights being granted exclu-
 sively to BMI except to the extent specifically set forth on Schedule A or on a clearance sheet or one sheet submitted
 pursuant to subparagraph A of paragraph TENTH.

B. The non-exclusive right to record, and to license others to record, any part or all of any of
 the works on electrical transmissions, wire, tape, film or otherwise, but only for the purpose of performing such work
 publicly by means of radio and television or for archive or audition purposes and not for sale to the public or for
 synchronization with motion pictures intended primarily for theatrical exhibition or with programs distributed by
 means of syndication to broadcasting stations.

C. The non-exclusive right to adapt, arrange, change and dramatize any part or all of any of
 the works for performance purposes, and to license others to do so.

FOURTH:

A. The rights granted to BMI by subparagraph A of paragraph THIRD hereof shall not
 include the right to perform or license the performance of more than one song or aria from an opera, operetta or
 musical comedy or more than five (5) minutes from a ballet if such performance is accompanied by the dramatic
 action, costumes or scenery of that opera, operetta, musical comedy or ballet.

B. Publisher, together with all the writers and co-publishers, if any, of a work, shall have the
 right jointly, by written notice to BMI, to exclude from the grant made by subparagraph A of paragraph THIRD
 hereof performance of more than thirty (30) minutes' duration of a work which is an opera, operetta or musical
 comedy, but this right shall not apply to a work which is the score of a film originally produced for exhibition in
 motion picture theaters when performed as incorporated in such film, or which is a score originally written for a radio
 or television program when performed as incorporated in such program.

FIFTH: As full consideration for all rights granted to BMI hereunder, BMI agrees to make payments to
 Publisher as follows:

A. With respect to each of the works in which BMI has exclusive performing rights:

(1) For performance of works on broadcasting stations in the United States, its terri-
 tories and possessions and Canada BMI will pay amounts equivalent to BMI's then standard practice upon
 the basis of the then current performance rates generally paid by BMI to its affiliated publishers for similar perfor-
 mance of similar compositions. The number of performances for which Publisher shall be entitled to payment shall
 be estimated by BMI in accordance with its then current system of computing the number of such performances.

(2) For performance of works outside of the United States, its territories and pos-
 sessions and Canada BMI will pay to Publisher all monies received by BMI in the United States from any performing
 rights licensing organization which are designated by such organization as the publisher's share of foreign perfor-
 mance royalties earned by any of the works after deduction of two percent (2%) of the gross amount thereof to cover
 BMI's handling charge.

(3) In the case of works which, or rights in which, are owned by Publisher jointly with
 one or more other publishers who have granted performing rights therein to BMI, the sum payable to Publisher under
 this subparagraph A shall be a pro rata share determined on the basis of the number of publishers, unless BMI shall
 have received from Publisher a copy of an agreement or other document signed by all of the publishers, providing
 for a different division of payment.

B. With respect to each of the works licensed by BMI in which its performing rights are non-

exclusive:

(1) The sum payable to Publisher together with other publishers, if any, who have
 granted performing rights therein to BMI, shall be one-half of the sum payable for performance of works under
 subparagraph A of this paragraph FIFTH.

(2) BMI shall have the right, at any time, upon at least sixty (60) days' written notice
 to Publisher to exercise such work from this agreement.

C. Notwithstanding the foregoing provisions of this paragraph FIFTH, BMI shall have no
 obligation to make payment hereunder with respect to any performance of a work which occurs prior to the date on
 which BMI has received from Publisher all of the monies with respect to such work referred to in subpara-
 graphs A and B of this paragraph FIFTH, and in the case of foreign performance, the information referred
 to in subparagraph B of paragraph FIFTH hereof.

SIXTH: BMI will furnish statements to Publisher at least twice during each year of the term showing the number of performances of the works as computed pursuant to subparagraph A(1) of paragraph FIFTH hereof, and at least once during each year of the term showing the monies received by BMI referred to in subparagraph A(2) of paragraph FIFTH hereof. Each such statement shall be accompanied by payment of the sum thereby shown to be due to Publisher, subject to all proper deductions, if any, for advances or amounts due to BMI from Publisher.

SEVENTH:

A. Notwithstanding the termination of this agreement, BMI shall continue to make payments to Publisher with respect to performance of any of the works in which BMI continues to license performing rights for so long as Publisher makes no other grant of performing rights therein to any other licensing organization; nothing in this agreement shall, however, require BMI to continue licensing any such work. The amounts of such payments shall be calculated pursuant to BMI's then current standard practices upon the basis of the then current performance rates generally paid by BMI to its affiliated publishers for similar performances of similar compositions.

B. BMI's obligation to continue payment to Publisher after the termination of this agreement for performances outside of the United States, its territories and possessions and Canada shall be dependent upon BMI's receipt in the United States of payments designated by foreign performing rights licensing organizations as the publisher's share of foreign performance royalties earned by any of the works. Payment of such foreign royalties shall be subject to deduction of BMI's then current handling charge applicable to its affiliated publishers.

EIGHTH: In the event that this agreement shall terminate at a time when, after crediting all earnings reflected by the statements rendered to Publisher prior to the effective date of such termination, there is an indebtedness from Publisher to BMI, for advances or otherwise, such termination shall not be effective with respect to the works then embraced by this agreement until thirty (30) days after such indebtedness shall be paid by Publisher or until a statement is rendered by BMI at its normal accounting period showing that the amount of such indebtedness has been fully received by BMI.

NINTH:

A. BMI shall have the right, upon written notice to Publisher, to exclude from this agreement, at any time, any work which in its opinion (1) is similar to a previously existing composition and might constitute a copyright infringement, or (2) has a title or name or lyric similar to that of a previously existing composition and might lead to a claim of unfair competition, or (3) is obscene, in bad taste or against public morals, or (4) is not reasonably suitable for performance.

B. In the case of works which in the opinion of BMI are based on compositions in the public domain, BMI shall have the right, at any time, upon written notice to Publisher, either (1) to exclude any such work from this agreement, or (2) to classify any such work as entitled to receive only a stated fraction of the full credit that would otherwise be given for performance thereof.

C. In the event that any work is excluded from this agreement pursuant to subparagraph A or B of this paragraph NINTH, or pursuant to subparagraph C of paragraph FIFTH hereof, all rights of BMI in such work shall automatically revert to Publisher ten (10) days after the date of the notice of such exclusion given by BMI to Publisher. In the event that a work is classified for less than full credit under subparagraph B(2) of this paragraph NINTH, Publisher shall have the right, by giving notice to BMI within ten (10) days after the date of BMI's notice to Publisher of the credit allocated to such work, to terminate all rights in such work granted to BMI herein and all such rights of BMI in such work shall revert to Publisher thirty (30) days after the date of such notice from Publisher to BMI.

TENTH:

A. With respect to each of the works which has been or shall be published on recorded commercially or synchronized with motion picture or television film or tape or which Publisher consents in writing to be performed, Publisher agrees to furnish to BMI:

(1) Two copies of a completed clearance sheet in the form supplied by BMI, unless a one sheet with respect to such work is furnished pursuant to subparagraph A(3) of this paragraph TENTH.

(2) A legible lead sheet or other written or printed copy of each work setting forth the lyrics, if any, and music correctly transcribed; provided that with respect to a work used solely as background music, such copy need be furnished only if requested by BMI.

(3) If such work has been or shall be synchronized with or otherwise used in connection with motion picture or television film or tape, a cue sheet showing the title, composer, publisher and nature and duration of the use of the work in such film or tape.

B. Publisher shall submit the material described in subparagraph A of this paragraph TENTH with respect to works heretofore published, recorded or synchronized and not included on Schedule A hereto within ten (10) days after the execution of this agreement and with respect to any of the works hereafter so submitted, recorded, synchronized or likely to be performed prior to the date of publication of release of the recording, film or tape or subsequent performance.

C. The submission of such clearance sheet or cue sheet shall constitute a warranty by Publisher that all of the information contained therein is true and correct and that no performing rights in any of the works listed therein has been granted to or reserved by others except as specifically set forth therein.

D. Publisher agrees:

(1) To submit to BMI, from time to time, so far as known to Publisher, the manuscript, names, catalog numbers and the names of the recording artists with respect to all phonograph records, tapes, electrical transmissions and other reproductions made of any of the works.

(2) To secure and maintain copyright protection of the works pursuant to the Copyright Law of the United States and pursuant to the laws of such other nations of the world where such protection is afforded and to give BMI prompt written notice of the date and number of copyright registrations and/or renewal of such work registered in the United States Copyright Office.

(3) To obtain and deliver to BMI any written agreement, assignment, instrument or documents of any kind with respect to any of the works which BMI may reasonably require.

ELEVENTH: Publisher warrants and represents that:

A. Publisher has the right to enter into this agreement; Publisher is not bound by any prior circumstances which conflict with its obligations herein; the rights granted by Publisher to BMI herein are the sole and exclusive property of Publisher and are free from all encumbrances and claims; and exercise of such rights will not constitute infringement of copyright or violation of any right of, or unfair competition with, any person, firm, corporation or association.

B. Except with respect to works in which the ownership of performing rights by another person, firm, corporation or association is conclusively set forth on Schedule A or on a clearance sheet or cue sheet submitted to BMI pursuant to subparagraph A of paragraph TENTH hereof, Publisher can exercise performing rights in each of the works or parts of works herein granted to Publisher solely by or on the authority and consent of other owners of such work.

TWELFTH:

A. Publisher agrees to defend, indemnify, save and hold BMI, its licensees, the advertisers of its licensees and their respective agents, servants and employees, free and harmless from and against any and all demands, suits, claims, damages, costs, including counsel fees, resulting from any claim of whatever nature arising from or in connection with the exercise of any of the rights granted by Publisher in this agreement; provided, however, that the obligations of Publisher under this paragraph TWELFTH shall not apply to any matter added to, or changes made in, any work by BMI or its licensees.

B. Upon the receipt by any of the parties hereto indemnified of any notice, demand, process, papers, writ or pleading, by which any such claim, demand, suit or proceeding is made or commenced against them, or any of them, which Publisher shall be obliged to defend hereunder, BMI shall, as soon as may be practicable, give Publisher notice thereof and deliver to Publisher such papers or true copies thereof, and BMI shall have the right to participate by counsel of its own choice, at its own expense. Publisher agrees to cooperate with BMI in all such matters.

C. In the event of such notification of claim or service of process on any of the parties hereto indemnified, BMI shall have the right, from the date thereof, to continue the work with respect to which a claim is made from this agreement and/or to withhold payment of all sums which may become due pursuant to this agreement or any modification thereof until such claim has been withdrawn, settled or adjudicated.

* THIRTEENTH: Publisher makes, constitutes and appoints BMI, or its nominee, Publisher's true and lawful attorney, irrevocably during the term hereof, in the name of BMI or that of its nominee, or in Publisher's name, or otherwise, to do all acts, take all proceedings, and execute, acknowledge and deliver any and all instruments, papers, documents, process or pleadings that may be necessary, proper or expedient to restrain infringement and/or to enforce and protect the rights granted by Publisher hereunder, and to recover damages in respect of or for the infringement or other violation of the said rights, and in BMI's sole judgment to join Publisher and/or others in whose favor the copyrights to any of the works may stand, and to discontinue, compromise or refer to arbitration, any such action or proceedings or to make any other disposition of the dispute in relation to the works; provided that any action or proceeding commenced by BMI pursuant to the provisions of this paragraph THIRTEENTH shall be at its sole expense and for its sole benefit.

FOURTEENTH:

A. It is acknowledged that BMI has heretofore entered into, and may during the term of this agreement enter into, contracts with performing rights licensing organizations for the licensing of public performing rights controlled by BMI in territories outside of the United States, its territories and possessions and Canada, (hereinafter called "foreign territories"). Upon Publisher's written request, BMI agrees to permit Publisher to grant performing rights in any or all of the works for any foreign territory for which, at the time such request is received, BMI has not entered into any such contract with a performing rights licensing organization; provided, however, that any such grant of performing rights by Publisher shall terminate at such time when BMI shall have entered into such a contract with a performing rights licensing organization covering such foreign territory and shall have notified Publisher thereof. Nothing herein contained, however, shall be deemed to restrict Publisher from assigning to its foreign publisher or representative the right to collect a part or all of the publishers' performance royalties earned by any or all of the works in any foreign territory as part of an agreement for the publication, exploitation or representation of such works in such territory, whether or not BMI has entered into such a contract with a performing rights licensing organization covering such territory.

B. Publisher agrees to notify BMI promptly in writing in such instances when publication, exploitation or other rights in any or all of the works are granted for any foreign territory. Such notice shall set forth the title of the work, the country or countries involved, the period of such grant, the name of the person, firm, corporation or association entitled to collect performance royalties earned in the foreign territory and the amount of such share. Within ten (10) days after the execution of this agreement Publisher agrees to submit to BMI, in writing, a list of all works to which Publisher has, prior to the effective date of this agreement, granted to any person, firm, corporation or association performing rights and/or the right to collect publisher performance royalties earned in any foreign territory.

C. In the event that BMI transmits to Publisher performance royalties designated as the writer's share of performance royalties earned by any of the works in any foreign territory, Publisher shall promptly pass such royalties to the writer or writers of the work involved. If Publisher is unable for any reason to locate and make payment to any of the writers involved within six (6) months from the date of receipt, the amounts due such writers shall be returned to BMI.

FIFTEENTH:

A. Publisher agrees that Publisher, its agent, employee, representative or affiliated composition, will not directly or indirectly during the term of this agreement:

(1) Solicit or accept payment from or on behalf of authors for composing music for lyrics, or from or on behalf of composers for writing lyrics to music.

(2) Solicit or accept manuscripts from composers or authors in consideration of any payments to be made by or on behalf of such composers or authors for reviewing, arranging, promotion, publication, recording or any other service connected with the exploitation of any composition.

(3) Permit Publisher's name, or the fact of its affiliation with BMI, to be used by any other person, firm, corporation or association engaged in any of the practices described in subparagraphs A(1) and A(2) of this paragraph FIFTEENTH.

(4) Submit to BMI, as one of the works to come within this agreement, any musical composition with respect to which any payments described in subparagraphs A(1) and A(2) of this paragraph FIFTEENTH have been made by or on behalf of a composer or author to any person, firm, corporation or association.

B. Publisher agrees that Publisher, its agent, employee or representative will not directly or indirectly during the term of this agreement make any effort to ascertain from, or offer any inducement or consideration to, anyone, including but not limited to any broadcasting licensee of BMI or to the agent, employee or representative of BMI or of any such licensee, for information regarding the time or times when any such BMI licensee is to report its performances to BMI, or to attempt in any way to manipulate performances or affect the representative character or accuracy of BMI's records of sampling or logging performances.

C. Publisher agrees to notify BMI promptly in writing (1) of any change of firm name or address of Publisher, and (2) of any change of ownership (20% or more in the ownership thereof).

D. In the event of the violation of any of the provisions of subparagraphs A, B or C of this paragraph FIFTEENTH, BMI shall have the right, at its sole discretion, to terminate this agreement by giving Publisher at least thirty (30) days' notice by registered or certified mail. In the event of such termination, no payment shall be due to Publisher pursuant to paragraph SEVENTH hereof.

SIXTEENTH: All disputes of any kind, nature or description whatsoever arising in connection with the terms and conditions of this agreement, or arising out of the performance thereof, or based upon an alleged breach thereof, shall be submitted to arbitration in the City, County and State of New York under the then prevailing rules of the American Arbitration Association by an arbitrator or arbitrators to be chosen as follows: Each of the parties hereto shall by notice in writing to the other name the right to appoint one arbitrator; provided, however, that if within

ten (10) days following the giving of such notice by one party the other shall not by written notice appoint another arbitrator the first arbitrator appointed shall be the sole arbitrator. If two arbitrators are so appointed, they shall themselves appoint the third arbitrator, provided that if ten (10) days shall elapse after the appointment of the second arbitrator and the said two arbitrators are unable to agree upon the appointment of the third arbitrator then either party may in writing request the American Arbitration Association to appoint the third arbitrator. The award made in the arbitration shall be binding and conclusive on the parties hereto and judgment may be, but need not be, entered thereon in any court having jurisdiction. Such award shall include the fixing of the cost of arbitration, which shall be borne by the unsuccessful party.

SEVENTEENTH: Publisher agrees that it shall not, without the written consent of BMI, assign any of its rights hereunder. No rights of any kind against BMI will be acquired by the assignee if any such purported assignment is made by Publisher without such written consent.

EIGHTEENTH: Any notice sent to Publisher pursuant to the terms of this agreement shall be valid if addressed to Publisher at the last address furnished by Publisher in writing to BMI's Department of Publisher Administration.

NINETEENTH: This agreement cannot be changed orally and shall be governed and construed pursuant to the laws of the State of New York.

TWENTIETH: This agreement, as of its effective date, contains and supersedes this agreement between the parties dated _____ and all modifications thereof (hereinafter called the "Superseded Agreement"). All works embraced by the Superseded Agreement shall be deemed included in Schedule A hereof.

It is agreed that any part of any advances heretofore made to Publisher pursuant to the Superseded Agreement which shall not have been recouped by performance of works up to the effective date of this agreement shall be deemed to be an advance against all monies which may become payable to Publisher pursuant to this agreement and any extensions, renewals or modifications thereof, or substitutions therefor, for performance of the works in the United States and Canada.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be duly executed as of the day and year first above written.

BROADCAST MUSIC, INC.

By _____

By _____

(Sign here)

SCHEDULE A

TITLE

WRITER(S)

CO-PUBLISHER (if any)
COMPANY PERCENTAGE

ANY OTHER
GRANT OF
PERFORMING
RIGHTS

EXHIBIT 12C/ID



AGREEMENT made this _____ day of _____, 19____, between
 BROADCAST MUSIC, INC., a New York corporation, whose address is 589 Fifth Avenue, New York, N. Y. 10017
 (hereinafter called "BMI") and _____
 a _____ corporation _____ doing business under the
 firm name and style of _____ whose address is _____
 (Street or Avenue) (City) (State) (Zip)
 (hereinafter called "Publisher").

WITNESSETH:

FIRST: The term of this agreement shall be the period of five (5) years from _____
 to _____ and continuing thereafter for additional periods of five (5) years each
 unless terminated by either party at the end of such initial period, or any such additional five (5) year period, upon
 at least three (3) months' notice by registered or certified mail.

SECOND: As used in this agreement, the word "works" shall mean:

A. All musical and dramatico-musical compositions, whether published or unpublished, now
 owned or copyrighted by Publisher or in which Publisher owns or controls performing rights, and

B. All musical and dramatico-musical compositions, whether published or unpublished, in
 which hereafter during the term Publisher acquires ownership or copyright or ownership or control of the performing
 rights, from and after the date of the acquisition by Publisher of such ownership or control.

THIRD: Publisher hereby sells, assigns and transfers to BMI, its successors or assigns, for the term of
 this agreement:

A. All the rights which Publisher owns or acquires publicly to perform, and to license others to
 perform, for profit or otherwise, anywhere in the world, any part or all of its works, such rights being granted exclu-
 sively to BMI except to the extent of any prior grant listed on clearance sheets or cues thereto submitted pursuant to
 subparagraph A of paragraph FIFTH with respect to works heretofore acquired by Publisher.

B. The non-exclusive right to record, and to license others to record, any part or all of any of
 the works on electrical transmissions, wire, tape, film or otherwise, but only for the purpose of performing such works
 publicly by means of radio and television or for archive or audience purposes and not for sale to the public or for
 synchronization with motion pictures intended primarily for theatrical exhibition or with programs distributed by
 means of syndication to broadcasting stations.

C. The non-exclusive right to adapt, arrange, change and dramatize any part or all of any of
 the works for performance purposes, and to license others to do so.

FOURTH:

A. The rights granted to BMI by subparagraph A of paragraph THIRD hereof shall not
 include the right to perform or license the performance of more than one song or aria from an opera, operetta or
 musical comedy or more than five (5) minutes from a ballet if such performance is accompanied by the dramatic
 action, costume or scenery of that opera, operetta, musical comedy or ballet.

B. Publisher, together with all the writers and co-publishers, if any, of a work, shall have the
 right jointly, by written notice to BMI, to exclude from the grant made by subparagraph A of paragraph THIRD
 hereof performances of more than thirty (30) minutes' duration of a work which is an opera, operetta or musical
 comedy, but this right shall not apply to a work which is the score of a film originally produced for exhibition in
 motion picture theaters when performed as incorporated in such film, or which is a score originally written for a radio
 or television program when performed as incorporated in such program.

FIFTH:

A. As full consideration for all rights granted to BMI hereunder, BMI agrees to make the
 following payments to Publisher with respect to each of the works in which BMI has exclusive performing rights:

(1) For performances of works on broadcasting stations in the United States, its terri-
 tories and possessions and Canada BMI will pay amounts calculated pursuant to BMI's then standard practices upon
 the basis of the then current performance rates generally paid by BMI to its affiliated publishers for similar perfor-
 mance of similar compositions. The number of performances for which Publisher shall be entitled to payment shall
 be estimated by BMI in accordance with its then current system of computing the number of such performances.

(2) For performances of works outside of the United States, its territories and pos-
 sessions and Canada BMI will pay to Publisher all monies received by BMI in the United States from any performing
 rights licensing organizations which are designated by such organization as the publisher's share of foreign perfor-
 mance revenue earned by any of the works after deduction of ten percent (10%) of the gross amount thereof to cover
 BMI's handling charge.

(3) In the case of works which, or rights in which, are owned by Publisher jointly with
 one or more other publishers who have granted performing rights therein to BMI, the sum payable to Publisher under
 this subparagraph A shall be a pro rata share determined on the basis of the number of publishers, inasmuch BMI shall
 have received from Publisher a copy of an agreement or other document signed by all of the publishers, promising
 for a different division of payment.

B. Notwithstanding the foregoing provisions of this paragraph FIFTH, BMI shall have no
 obligation to make payment hereunder with respect to any performance of a work which occurs prior to the date on
 which BMI shall have received from Publisher all of the material with respect to such work referred to in subpara-
 graphs A and B(1) of paragraph FIFTH hereof, and in the case of foreign performances, the information referred
 to in subparagraph B of paragraph FIFTH hereof.

SIXTH. BMI will furnish statements to Publisher at least twice during each year of the term showing the number of performances of the works as computed pursuant to subparagraph A(1) of paragraph FIFTH hereof, and at least once during each year of the term showing the monies received by BMI referred to in subparagraph A(2) of paragraph FIFTH hereof. Each such statement shall be accompanied by payment of the sum thereby shown to be due to Publisher, subject to all proper deductions, if any, for advances or amounts due to BMI from Publisher.

SEVENTH.

A. Notwithstanding the termination of this agreement, BMI shall continue to make payments to Publisher with respect to performances of any of the works in which BMI continues to license performing rights for so long as Publisher makes no other grant of performing rights therein to any other licensing organization; nothing in this agreement shall, however, require BMI to continue licensing any such work. The amounts of such payments shall be calculated pursuant to BMI's then current standard practices upon the basis of the then current performance rates generally paid by BMI to its affiliated publishers for similar performances of similar compositions.

B. BMI's obligation to continue payment to Publisher after the termination of this agreement for performances outside of the United States, its territories and possessions and Canada shall be dependent upon BMI's receipt in the United States of payments computed by foreign performing rights licensing organizations as the publisher's share of foreign performance royalties earned by any of the works. Payment of such foreign royalties shall be subject to deduction of BMI's then current handling charge applicable to its affiliated publishers.

EIGHTH. In the event that this agreement shall terminate at a time when, after crediting all earnings reflected by the statements rendered to Publisher prior to the effective date of such termination, there is an indebtedness from Publisher to BMI, for advances or otherwise, such termination shall not be effective with respect to the works then embraced by this agreement until thirty (30) days after such indebtedness shall be paid by Publisher or until a statement is rendered by BMI at its normal accounting period showing that the amount of such indebtedness has been fully recouped by BMI.

NINTH.

A. BMI shall have the right, upon written notice to Publisher, to exclude from this agreement, at any time, any work which in its opinion (1) is similar to a previously existing composition and might constitute a copyright infringement, or (2) has a title or theme or lyrics similar to that of a previously existing composition and might lead to a claim of unfair competition, or (3) is offensive in bad taste or against public morals, or (4) is not reasonably suitable for performance.

B. In the case of works which in the opinion of BMI are based on compositions in the public domain, BMI shall have the right, at any time, upon written notice to Publisher, either (1) to exclude any such work from this agreement, or (2) to classify any such work as suitable to receive only a stated fraction of the full credit that would otherwise be given for performances thereof.

C. In the event that any work is excluded from this agreement pursuant to subparagraph A or B of this paragraph NINTH, or pursuant to subparagraph C of paragraph FIFTH hereof, all rights of BMI in such work shall automatically revert to Publisher ten (10) days after the date of the notice of such exclusion given by BMI to Publisher. In the event that a work is classified for one-third full credit under subparagraph B(2) of this paragraph NINTH, Publisher shall have the right, by giving notice to BMI within ten (10) days after the date of BMI's notice to Publisher of the credit allocated to such work, to terminate all rights in such work granted to BMI, herein and all such rights of BMI in such work shall revert to Publisher thirty (30) days after the date of such notice from Publisher to BMI.

TENTH. A. With respect to each of the works which has been or shall be published or recorded commercially or synchronized with motion picture or television film or tape or which Publisher considers likely to be performed, Publisher agrees to furnish to BMI two copies of a complete clearance sheet in the form supplied by BMI, unless a one sheet with respect to such work is furnished pursuant to subparagraph A(3) of this paragraph TENTH.

(1) A legible lead sheet or other written or printed copy of such work setting forth the lyrics, if any, and words securely enclosed; provided that with respect to a work used solely as background music, such copy need be furnished only if requested by BMI.

(2) If such work has been or shall be synchronized with or otherwise used in connection with motion picture or television film or tape, a cue sheet showing the title, composer, publisher and nature and duration of the use of the work in such film or tape.

B. Publisher shall submit the material described in subparagraph A of this paragraph TENTH with respect to works heretofore published, recorded or synchronized within ten (10) days after the execution of this agreement and with respect to any of the works hereafter so published, recorded, synchronized or likely to be performed prior to the date of publication or release of the recording, film or tape or announced performance.

C. The submission of each clearance sheet or cue sheet shall constitute a warranty by Publisher that all of the information contained therein is true and correct and that no performing rights in any of the works listed therein have been granted to or reserved by others except as specifically set forth therein.

D. Publisher agrees to:

- (1) To submit to BMI, from time to time, so far as known to Publisher, the master copies, catalog numbers and the names of the recording artists with respect to all phonograph records, tapes, commercial gramophones and other reproductions made of any of the works.

- (2) To secure and maintain copyright protection of the works pursuant to the Copyright Law of the United States and pursuant to the laws of such other nations of the world where such protection is afforded; and to give BMI prompt written notice of the date and number of copyright registrations and of renewal of such work registrable in the United States Copyright Office.

- (3) To obtain and deliver to BMI any written agreements, assignments, assignments of assignments of any kind with respect to any of the works which BMI may reasonably require.

ELEVENTH. Publisher warrants and represents that:

A. Publisher has the right to enter into this agreement; Publisher is not bound by any other commitment which conflicts with the understanding herein; the rights granted by Publisher to BMI herein are the sole and exclusive property of Publisher and are free from all encumbrances and claims; and execution of such covenants and conditions is not constitutive of assignment of copyright or violation of any right of, or unfair competition with, any person, firm, corporation or association.

11. Except with respect to works in which the permission of performing rights by another publisher, corporation or association is specifically set forth on Schedule A or on a certificate sheet or one sheet submitted to BMI pursuant to subparagraph A of paragraph TWELFTH hereof, Publisher has exclusive performing rights in each of the works by virtue of written grants thereof to Publisher signed by all the authors and composers or other owners of such work.

TWELFTH

A. Publisher agrees to defend, indemnify, save and hold BMI, its nominees, the advertising or its licensee and their respective agents, servants and employees, free and harmless from and against any and all demands, loss, damage, suits, judgments, recoveries and costs, including counsel fees, resulting from any claim of infringement made against BMI or in connection with the exercise of any of the rights granted by this agreement provided, however, that the obligations of Publisher under this paragraph TWELFTH shall not apply to any matter added to, or changes made to, any work by BMI or its licensee.

B. Upon the receipt by any of the parties herein indemnified of any notice, demand, process, papers, writ or pleading, by which any such claim, demand, suit or proceeding is made or commenced against them, or any of them, which Publisher shall be obliged to defend hereunder, BMI shall, at once as may be practicable, give Publisher notice thereof and deliver to Publisher such papers or true copies thereof, and BMI shall have the right to participate by counsel of its own choice, at its own expense, Publisher agrees to cooperate with BMI in all such matters.

C. In the event of such notification of claim or service of process on any of the parties herein indemnified, BMI shall have the right, from the date thereof, to continue the work with respect to which a claim is made from this agreement and/or to withhold payment of all sums which they become due pursuant to this agreement or any modification thereof until such claim has been withdrawn, settled or adjudicated.

THIRTEENTH. Publisher makes, disseminates and appoints BMI, or its nominees, Publisher's true and lawful attorney, lawfully during the term hereof, in the name of BMI or that of its nominees or in Publisher's name, or otherwise, to do all acts, take all proceedings, and execute, countermand and deliver any and all instruments, to print, disseminate, process or pleadings that may be necessary, proper or expedient to recover infringement of and/or to enforce and protect the rights granted by Publisher hereunder, and to recover damages in respect of or for the infringement or other violation of the said rights, and in BMI's sole judgment to join Publisher and/or others in whose names the copyrights to any of the works may stand, and to discontinue, compromise or refer to arbitration, set aside actions or proceedings or to make any other disposition of the dispute in relation to the works provided that any action or proceeding commenced by BMI pursuant to the provisions of this paragraph THIRTEENTH shall be at its sole expense and for its sole benefit.

FOURTEENTH

A. It is acknowledged that BMI has heretofore secured, and may during the term of this agreement secure, licenses with performing rights licensing organizations for the licensing of public performing rights controlled by BMI in territories outside of the United States, its territories and possessions and Canada (hereinafter called "foreign territories"). Upon Publisher's written request, BMI agrees to permit Publisher to grant performing rights in any or all of the works for any foreign territory for which, at the time such request is received, BMI has not secured such a performing rights licensing organization; provided, however, that any such grant of performing rights by Publisher shall terminate at such time when BMI shall have entered into such a contract with a performing rights licensing organization covering such foreign territory and shall have notified Publisher thereof. Nothing herein contained, however, shall be deemed to restrict Publisher from assigning to its foreign publisher or representative the right to collect a part or all of the publisher's performance royalties earned by any or all of the works in any foreign territory as part of an agreement for the purchase, sale, exploitation or representation of such works in such territory, whether or not BMI has secured into such a contract with a performing rights licensing organization covering such territory.

B. Publisher agrees to notify BMI promptly in writing in each instance when publication, or publication or other rights in any or all of the works are granted for any foreign territory. Such notice need not set forth the title of the work, the country or countries involved, the period of such grant, the name of the person, firm, corporation or association entitled to collect performance royalties earned in the foreign territory and the amount of such share. Within ten (10) days after the execution of this agreement Publisher agrees to submit to BMI, in writing, a list of all works in which Publisher has, prior to the effective date of this agreement, granted to any person, firm, corporation or association performing rights and/or the right to collect publisher's performance royalties earned in any foreign territory.

C. In the event that BMI transmits to Publisher performance royalties designated as the writer's share of performance royalties earned by any of the works in any foreign territory, Publisher shall protect such royalties to the writer or writers of the works involved. If Publisher is unable for any reason to make such payment to any of the writers involved within six (6) months from the date of receipt, the amount due such writer shall be returned to BMI.

FIFTEENTH

A. Publisher agrees that Publisher, in its capacity as agent, representative or related company, will not directly or indirectly during the term of this agreement,

(1) Solicit or accept payment from or on behalf of authors for composing time, or from or on behalf of composers for writing lyrics to music;

(2) Solicit or accept manuscripts from composers or authors for reviewing, arranging, producing, publishing, recording or any other service connected with the exploitation of any composition;

(3) Permit Publisher's name, or the name of its affiliates with BMI, to be used by any other person, firm, corporation or association engaged in any of the practices described in subparagraphs A(1) and A(2) of this paragraph FIFTEENTH.

(4) Submit to BMI, as one of the works to come within this agreement, any such composition with respect to which any payment described in subparagraphs A(1) and A(2) of this paragraph FIFTEENTH have been made by or on behalf of a composer or author of any person, firm, corporation or association.

B. Publisher agrees that Publisher, its agent, officers or representatives will not directly or indirectly during the term of this agreement make any effort to interfere with or effect any impairment of or reduction in, anyone, including but not limited to any broadcasting station of BMI or to the agent, officer or representative of BMI or of any such licensee, for information regarding the use of such work and BMI's license is to report its performance to BMI, or to attempt in any way to manipulate performance or affect the representative character or territory of BMI's system of sampling or logging performances.

C. Publisher agrees to notify BMI promptly in writing (1) of any change of firm name or address of Publisher, and (2) of any change of twenty percent (20%) or more in the ownership thereof.

D. In the event of the violation of any of the provisions of subparagraphs A, B or C of this paragraph FIFTEENTH, BMI shall have the right, in its sole discretion, to terminate this agreement by giving Publisher at least thirty (30) days' notice by registered or certified mail. In the event of such termination, no payments shall be due to Publisher pursuant to paragraph SEVENTH hereof.

SEVENTEENTH: All disputes of any kind, nature or description whatsoever arising in connection with the terms and conditions of this agreement or arising out of the performance thereof, or based upon an alleged breach thereof, shall be submitted to arbitration in the City, County and State of New York under the then prevailing rules of the American Arbitration Association by an arbitrator or arbitrators to be selected as follows: Each of the parties hereto shall by written notice to the other have the right to appoint one arbitrator; provided, however, that if within ten (10) days following the giving of such notice by one party the other shall not by written notice appoint another arbitrator the first arbitrator appointed shall be the sole arbitrator. If two arbitrators are so appointed, they shall thereupon appoint the third arbitrator, provided that if ten (10) days shall elapse after the appointment of the second arbitrator and the said two arbitrators are unable to agree upon the appointment of the third arbitrator then either party may in writing request the American Arbitration Association to appoint the third arbitrator. The award made in the arbitration shall be binding and conclusive on the parties hereto and judgment may be, but need not be, entered thereon in any court having jurisdiction. Such award shall include the fixing of the cost of arbitration, which shall be borne by the unsuccessful party.

SEVENTEENTH: Publisher agrees that it shall not, without the written consent of BMI, assign any of its rights hereunder. No right of any kind against BMI will be acquired by the assignee if any such purported assignment is made by Publisher without such written consent.

EIGHTEENTH: Any notice sent to Publisher pursuant to the terms of this agreement shall be valid if addressed to Publisher at the last address furnished by Publisher in writing to BMI's Department of Publisher Administration.

NINETEENTH: This agreement cannot be changed orally and shall be governed and construed pursuant to the laws of the State of New York.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be duly executed as of the day and year first above written.

BROADCAST MUSIC, INC.

By _____

By _____

(Sign here)

EXHIBIT 11J/ID

SAMPLE OF BMI--COMPOSER AFFILIATION AGREEMENTS



BROADCAST MUSIC, INC.

889 Fifth Avenue

New York, N. Y. 10017

B 4849

12/68

Date

Dear

The following shall constitute the agreement between us:

1. As used in this agreement:

(a) The word "period" shall mean the term of two years from to , and continuing thereafter for additional terms of two years each unless terminated by either party at the end of said initial term or any additional term, upon at least sixty (60) days' notice by registered or certified mail.

(b) The word "works" shall mean:

(i) All musical and dramatico-musical compositions composed by you alone or with one or more collaborators during the period; and

(ii) All musical and dramatico-musical compositions composed by you alone or with one or more collaborators prior to the period, except those in which there is an outstanding grant of the right of public performance to a person other than a publisher affiliated with BMI.

2. You hereby warrant and represent that Schedule "A" hereto is a complete listing of all the works which have been published in printed copies or commercially recorded or which are being currently performed or which you regard as likely to be performed; that the information contained in said Schedule is true and correct; and that no performing rights in any of said works have been granted to others except as specifically set forth in said Schedule.

3. You agree that in each instance that a work not listed on Schedule "A" is published in printed copies or recorded commercially or in synchronization with film or tape, or is regarded by you as likely to be performed, whether such work is composed prior to the execution of this agreement or hereafter during the period, you will promptly furnish to us a copy of the work together with a supplement to Schedule "A" setting forth the information with respect thereto called for by said Schedule. Such action by you shall constitute a warranty that the information contained in such supplement is true and correct.

4. You hereby grant to us for the period:

(a) All the rights that you own or acquire publicly to perform, and to license others to perform, for profit or otherwise, anywhere in the world, any part or all of the works, such rights being granted exclusively to us except to the extent of any prior grants listed on Schedule "A" hereto.

(b) The non-exclusive right to record, and to license others to record, any part or all of any of the works on electrical transcriptions, wire, tape, film or otherwise, but only for the purpose of performing such work publicly by means of radio and television or for archive or audition purposes and not for sale to the public or for synchronization with motion pictures intended primarily for theatrical exhibition or with programs distributed by means of syndication to broadcasting stations.

(c) The non-exclusive right to adapt, arrange, change and dramatize any part or all of any of the works for performance purposes, and to license others to do so.

5. (a) The rights granted to us by sub-paragraph (a) of paragraph 4 hereof shall not include the right to perform or license the performance of more than one song or aria from an opera, operetta, or musical comedy or more than five minutes from a ballet if such performance is accompanied by the dramatic action, costumes or scenery of that opera, operetta, musical comedy or ballet.

(b) You, together with the publisher and your collaborators, if any, shall have the right jointly, by written notice to us, to exclude from the grant made by sub-paragraph (a) of paragraph 4 hereof performances of more than thirty (30) minutes' duration of a work which is an opera, operetta or musical comedy, but this right shall not apply to a work which is the score of a film originally written for exhibition in motion picture theaters when performed as incorporated in such film, or which is a score originally written for a radio or television program when performed as incorporated in such program.

6. (a) As full consideration for all rights granted to us hereunder, we agree to pay to you, with respect to each of the works in which we obtain and retain exclusive performing rights during the period:

(i) For performances of a work on broadcasting stations in the United States, its territories and possessions and Canada, amounts calculated pursuant to our then current standard practices upon the basis of the then current performance rates generally paid by us to our affiliated writers for similar performances of similar compositions. The number of performances for which you shall be entitled to payment shall be estimated by us in accordance with our then current system of computing the number of such performances.

(ii) All monies received by us from any performing rights licensing organization outside of the United States, its territories and possessions and Canada, which are designated by such performing rights licensing organization as the author's share of foreign performance royalties earned by your works after the deduction of ten percent (10%) of the gross amount thereof to cover our handling charge.

(b) In the case of a work composed by you with one or more collaborators, the sum payable to you hereunder shall be a pro rata share, determined on the basis of the number of collaborators, unless you shall have transmitted to us a copy of an agreement between you and your collaborators, providing for a different division of payment.

(c) We shall have no obligation to make payment hereunder with respect to (i) any performance of a work which occurs prior to the date on which we have received from you all of the information and material with respect to such work which is referred to in paragraph 2 or 3 hereof, or (ii) any performance of a work for which you receive payment of performance royalties from the publisher thereof. You waive the right to receive performance royalties from the publisher of any work with respect to any and all performances thereof for which you receive payment from us hereunder.

7. We will furnish statements to you at least twice during each year of the period showing the number of performances as computed pursuant to sub-paragraph (a) (i) of paragraph 6 hereof and at least once during each year of the period showing the monies due pursuant to sub-paragraph (a) (ii) of paragraph 6 hereof. Each statement shall be accompanied by payment to you, subject to all proper deductions for advances, if any, of the sum thereby shown to be due for such performances.

8. (a) Notwithstanding the termination of this agreement, we shall continue to make payments to you with respect to performances of any of the works in which we have exclusive performing rights for so long as we continue to have such exclusive rights; but nothing in this agreement shall require us to continue licensing any such work. The amounts of such payments shall be calculated pursuant to our then current standard practices upon the basis of the then current performance rates generally paid by us to our affiliated writers for similar performances of similar compositions.

(b) Our obligation to continue payment to you after the termination of this agreement for performances outside of the United States, its territories and possessions and Canada shall be dependent upon our receipt in the United States of payments designated by foreign performing rights organizations as the author's share of foreign performance royalties earned by your works. Payment of such foreign royalties shall be subject to deduction of our then current handling charge applicable to our affiliated writers.

9. In the event that you terminate this agreement pursuant to sub-paragraph (a) of paragraph 1 hereof at a time when, after crediting all earnings reflected by the statements rendered to you prior to the effective date of such termination, there remains an unearned balance of advances made to you by us, such termination shall not be effective with respect to the works then embraced by this agreement unless and until thirty (30) days after the unpaid balance of advances shall be repaid by you or until a statement is rendered by us at our normal accounting period showing that such unearned balance of advances has been fully recouped by us.

10. You warrant and represent that you have the right to enter into this agreement; that you are not bound by any prior commitments which conflict with your commitments hereunder; that each of the works, composed by you alone or with one or more collaborators, is original; and that exercise of the rights granted by you herein will not constitute an infringement of copyright or violation of any other right of, or unfair competition with, any person, firm or corporation. You agree to indemnify and hold harmless us and our licensees from and against any and all loss or damage resulting from any claim of whatever nature arising from or in connection with the exercise of any of the rights granted by you in this agreement. Upon notification to us or any of our licensees of a claim with respect to any of the works, we shall have the right to exclude such work from this agreement and/or to withhold payment of all sums which become due pursuant to this agreement or any modification thereof until such claim has been withdrawn, settled or adjudicated.

11. (a) We shall have the right, upon written notice to you, to exclude from this agreement, at any time, any work which in our opinion (i) is similar to a previously existing composition and might constitute a copyright infringement, or (ii) has a title or music or lyric similar to that of a previously existing composition and might lead to a claim of unfair competition, or (iii) is offensive, in bad taste or against public morals, or (iv) is not reasonably suitable for performance.

(b) In the case of works which in our opinion are based on compositions in the public domain, we shall have the right, upon written notice to you, either (i) to exclude any such work from this agreement, or (ii) to classify any such work as entitled to receive only a fraction of the full credit that would otherwise be given for performance thereof.

(c) In the event that any work is excluded from this agreement pursuant to paragraph 10 or sub-paragraph (a) or (b) of this paragraph 11, all rights in such work shall automatically revert to you ten (10) days after the date of our notice to you of such exclusion. In the event that a work is classified for less than full credit under sub-paragraph (b) (ii) of this paragraph 11, you shall have the right, by giving notice to us, within ten (10) days after the date of our letter advising you of the credit allocated to the work, to terminate our rights therein, and all rights in such work shall thereupon revert to you.

12. In each instance that you write, or are employed or commissioned by a motion picture producer to write, during the period, all or part of the score of a motion picture intended primarily for exhibition in theaters, or by the producer of a dramatico-musical work or revue for the legitimate stage to write, during the period, all or part of the musical compositions contained therein, we agree to advise the producer of the film that such part of the score as is written by you may be performed as part of the exhibition of said film in theaters in the United States, its territories and possessions, without compensation to us, or to the producer of the dramatico-musical work or revue that your compositions embodied therein may be performed on the stage with living artists as part of such dramatico-musical work or revue, without compensation to us. In the event that we notify you that we have established a system for the collection of royalties for performance of the scores of motion picture films in theaters in the United States, its territories and possessions, we shall no longer be obligated to take such action with respect to motion picture scores.

13. You make, constitute and appoint us, or our nominee, your true and lawful attorney, irrevocably during the term hereof, in our name or that of our nominee, or in your name, or otherwise, to do all acts, take all proceedings, execute, acknowledge and deliver any and all instruments, papers, documents, process or pleadings that may be necessary, proper or expedient to restrain infringement of and/or to enforce and protect the rights granted by you hereunder, and to recover damages in respect to or for the infringement or other violation of the said rights, and in our sole judgment to join you and/or others in whose names the copyrights to any of the works may stand; to discontinue, compromise or refer to arbitration, any such actions or proceedings or to make any other disposition of the disputes in relation to the works, provided that any action or proceeding commenced by us pursuant to the provisions of this paragraph shall be at our sole expense and for our sole benefit.

14. You agree that you, your agents, employees or representatives will not, directly or indirectly, solicit or accept payment from writers for composing music for lyrics or writing lyrics to music or for reviewing, publishing, promoting, recording or rendering other services connected with the exploitation of any composition, or permit use of your name or your affiliation with us in connection with any of the foregoing. In the event of a violation of any of the provisions of this paragraph 14, we shall have the right, in our sole discretion, by giving you at least thirty (30) days' notice by registered or certified mail, to terminate this agreement. In the event of such termination no payments shall be due to you pursuant to paragraph 8 hereof.

15. No monies due or to become due to you shall be assignable, whether by way of assignment, sale or power granted to an attorney-in-fact, without our prior written consent. If any assignment of such monies is made by you without such prior written consent, no rights of any kind against us will be acquired by the assignee, purchaser or attorney-in-fact.

16. All disputes of any kind, nature or description whatsoever arising in connection with the terms and conditions of this agreement, or arising out of the performance thereof, or based upon an alleged breach thereof, shall be submitted to arbitration in the City, County and State of New York under the then prevailing rules of the American Arbitration Association by an arbitrator or arbitrators to be selected as follows: Each of us shall by written notice to the other have the right to appoint one arbitrator, provided, however, that if within ten (10) days following the giving of such notice by one of us the other shall not by written notice appoint another arbitrator the first arbitrator appointed shall be the sole arbitrator. If two arbitrators are so appointed, they shall thereupon appoint the third arbitrator, provided that if ten (10) days shall elapse after the appointment of the second arbitrator and the said two arbitrators are unable to agree upon the appointment of the third arbitrator then either of us may, in writing, request the American Arbitration Association to appoint the third arbitrator. The award made in the arbitration shall be binding and conclusive on us and judgment may be, but need not be, entered thereon in any court having jurisdiction. Such award shall include the fixing of the cost of arbitration, which shall be borne by the unsuccessful party.

17. Any notice sent to you pursuant to the terms of this agreement shall be valid if addressed to you at the last address furnished by you in writing to our Department of Writer Administration.

18. This agreement cannot be changed orally and shall be governed and construed pursuant to the laws of the State of New York.

Very truly yours,

BROADCAST MUSIC, INC.

ACCEPTED AND AGREED TO:

By

SCHEDULE "A"

<u>WILE</u>	<u>CO-WRITERS (if any)</u>	<u>YOUR PER- CENTAGE OF WRITER CREDIT</u>	<u>PUBLISHER</u>	<u>ANY OTHER GRANT OF PERFORMING RIGHTS BY YOU OR YOUR CO-WRITER</u>
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EXHIBIT 11M/ID



B 4848

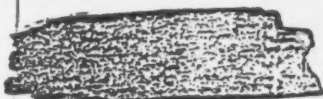
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BROADCAST MUSIC, INC.

589 Fifth Avenue

New York, N. Y. 10017

Date



Dear

The following shall constitute the agreement between us:

1. As used in this agreement:

(a) The word "period" shall mean the term from _____ to _____, and continuing thereafter for additional terms of two years each unless terminated by either party at the end of said initial term or any additional term, upon at least sixty (60) days' notice by registered or certified mail.

(b) The word "works" shall mean:

(i) All musical and dramatico-musical compositions composed by you alone or with one or more collaborators during the period; and

(ii) All musical and dramatico-musical compositions composed by you alone or with one or more collaborators prior to the period, except those in which there is an outstanding grant of the right of public performance to a person other than a publisher affiliated with BMI.

2. You agree that:

(a) Within ten (10) days after the execution of this agreement you will furnish to us a copy of each work heretofore composed by you which has been published in printed copies or recorded commercially or which is being currently performed or which you consider as likely to be performed, together with two copies of a completed clearance sheet in the form supplied by BMI with respect to each such work.

(b) In each instance that a work not submitted to us pursuant to sub-paragraph (a) hereof is published in printed copies or recorded commercially or in synchronization with film or tape or is considered by you as likely to be performed, whether such work is composed prior to the execution of this agreement or hereafter during the period, you will promptly furnish to us a copy of the work together with two copies of a completed clearance sheet in the form supplied by BMI with respect to each such work.

3. The submission of clearance sheets pursuant to paragraph 2 hereof shall constitute a warranty by you that all of the information contained therein is true and correct and that no performing rights in such work have been granted to or reserved by others except as specifically set forth therein in connection with works heretofore written or co-written by you.

4. You hereby grant to us for the period:

(a) All the rights that you own or acquire publicly to perform, and to license others to perform, for profit or otherwise, anywhere in the world, any part or all of the works, such rights being granted exclusively to us except to the extent of any prior grants listed on clearance sheets submitted with respect to works heretofore written or co-written by you.

(b) The non-exclusive right to record, and to license others to record, any part or all of any of the works on electrical transmissions, wire, tape, film or otherwise, but only for the purpose of performing such work publicly by means of radio and television or for archive or audition purposes and not for sale to the public or for synchronization with motion pictures intended primarily for theatrical exhibition or with programs distributed by means of syndication to broadcasting stations.

(c) The non-exclusive right to adapt, arrange, change and dramatize any part or all of any of the works for performance purposes, and to license others to do so.

5. (a) The rights granted to us by sub-paragraph (a) of paragraph 4 hereof shall not include the right to perform or arrange the performance of more than one song or aria from an opera, operetta, or musical comedy or more than five minutes from a ballet if such performance is accompanied by the dramatic action, costumes or scenery of that opera, operetta, musical comedy or ballet.

(b) You, together with the publisher and your collaborators, if any, shall have the right jointly, by written notice to us, to exclude from the grant made by sub-paragraph (a) of paragraph 4 hereof performances of more than thirty (30) minutes' duration of a work which is an opera, operetta or musical comedy, but this right shall not apply to a work which is the score of a film originally written for exhibition in motion picture theaters when performed as incorporated in such film, or which is a score originally written for a radio or television program when performed as incorporated in such program.

6. (a) As full consideration for all rights granted to us hereunder, we agree to pay to you, with respect to each of the works in which we obtain and retain exclusive performing rights during the period:

(i) For performances of a work on broadcasting stations in the United States, its territories and possessions and Canada, amounts calculated pursuant to our then current standard practices upon the basis of the then current performance rates generally paid by us to our affiliated writers for similar performances of similar compositions. The number of performances for which you shall be entitled to payment shall be estimated by us in accordance with our then current system of computing the number of such performances.

(ii) All monies received by us from any performing rights licensing organization outside of the United States, its territories and possessions and Canada, which are designated by such performing rights licensing organization as the author's share of foreign performance royalties earned by your works after the deduction of ten percent (10%) of the gross amount thereof to cover our handling charge.

(b) In the case of a work composed by you with one or more collaborators, the sum payable to you hereunder shall be a pro rata share, determined on the basis of the number of collaborators, unless you shall have transmitted to us a copy of an agreement between you and your collaborators, providing for a different division of payment.

(c) We shall have no obligation to make payment hereunder with respect to (i) any performance of a work which occurs prior to the date on which we have received from you all of the information and material with respect to such work which is referred to in paragraph 2 or 3 hereof, or (ii) any performance of a work for which you receive payment of performance royalties from the publisher thereof. You waive the right to receive performance royalties from the publisher of any work with respect to any and all performances thereof for which you receive payment from us hereunder.

7. We will furnish statements to you at least twice during each year of the period showing the number of performances as computed pursuant to sub-paragraph (a) (i) of paragraph 6 hereof and at least once during each year of the period showing the monies due pursuant to sub-paragraph (a) (ii) of paragraph 6 hereof. Each statement shall be accompanied by payment to you, subject to all proper deductions for advances, if any, of the sum thereby shown to be due for such performances.

8. (a) Notwithstanding the termination of this agreement, we shall continue to make payments to you with respect to performances of any of the works in which we have exclusive performing rights for so long as we continue to have such exclusive rights; but nothing in this agreement shall require us to continue licensing any such work. The amounts of such payments shall be calculated pursuant to our then current standard practices upon the basis of the then current performance rates generally paid by us to our affiliated writers for similar performances of similar compositions.

(b) Our obligation to continue payment to you after the termination of this agreement for performances outside of the United States, its territories and possessions and Canada shall be dependent upon our receipt in the United States of payments designated by foreign performing rights organizations as the author's share of foreign performance royalties earned by your works. Payment of such foreign royalties shall be subject to deduction of our then current handling charge applicable to our affiliated writers.

9. In the event that you terminate this agreement pursuant to sub-paragraph (a) of paragraph 1 hereof at a time when, after crediting all earnings reflected by the statements rendered to you prior to the effective date of such termination, there remains an unearned balance of advances made to you by us, such termination shall not be effective with respect to the works then embraced by this agreement unless and until thirty (30) days after the unpaid balance of advances shall be repaid by you or until a statement is rendered by us at our normal accounting period showing that such unearned balance of advances has been fully recouped by us.

10. You warrant and represent that you have the right to enter into this agreement; that you are not bound by any prior commitments which conflict with your commitments hereunder; that each of the works, composed by you alone or with one or more collaborators, is original; and that exercise of the rights granted by you herein will not constitute an infringement or violation of any other right of, or unfair competition with, any person, firm or corporation. You agree to indemnify and hold harmless us and our licensees from and against any and all loss or damage resulting from any claim of whatever nature arising from or in connection with the exercise of any of the rights granted by you in this agreement. Upon notification to us or any of our licensees of a claim with respect to any of the works, we shall have the right to exclude such work from this agreement and/or to withhold payment of all sums which become due pursuant to this agreement or any modification thereof until such claim has been withdrawn, settled or adjudicated.

11. (a) We shall have the right, upon written notice to you, to exclude from this agreement, at any time, any work which in our opinion (i) is similar to a previously existing composition and might constitute a copyright infringement, or (ii) has a title or music or lyric similar to that of a previously existing composition and might lead to a claim of unfair competition, or (iii) is offensive, in bad taste or against public morals, or (iv) is not reasonably suitable for performance.

(b) In the case of works which in our opinion are based on compositions in the public domain, we shall have the right, upon written notice to you, either (i) to exclude any such work from this agreement, or (ii) to classify any such work as entitled to receive only a fraction of the full credit that would otherwise be given for performances thereof.

(c) In the event that any work is excluded from this agreement pursuant to paragraph 10 or sub-paragraph (a) or (b) of this paragraph 11, all rights in such work shall automatically revert to you ten (10) days after the date of our notice to you of such exclusion. In the event that a work is classified for less than full credit under sub-paragraph (b) (ii) of this paragraph 11, you shall have the right, by giving notice to us, within ten (10) days after the date of our letter advising you of the credit allocated to the work, to terminate our rights therein, and all rights in such work shall thereupon revert to you.

12. In each instance that you write, or are employed or commissioned by a motion picture producer to write, during the period, all or part of the score of a motion picture intended primarily for exhibition in theaters, or by the producer of a dramatic-musical work or revue for the legitimate stage to write, during the period, all or part of the musical compositions contained therein, we agree to advise the producer of the film that such part of the score as is written by you may be performed as part of the exhibition of said film in theaters in the United States, its territories and possessions, without compensation to us, or to the producer of the dramatic-musical work or revue that your compositions embodied therein may be performed on the stage with living artists as part of such dramatic-musical work or revue, without compensation to us. In the event that we notify you that we have established a system for the collection of royalties for performance of the scores of motion picture films in theaters in the United States, its territories and possessions, we shall no longer be obligated to take such action with respect to motion picture scores.

13. You make, constitute and appoint us, or our nominee, your true and lawful attorney, irrevocably during the term hereof, in our name or that of our nominee, or in your name, or otherwise, to do all acts, take all proceedings, execute, acknowledge and deliver any and all instruments, papers, documents, process or pleadings that may be necessary, proper or expedient to restrain infringement of and/or to enforce and protect the rights granted by you hereunder, and to recover damages in respect to or for the infringement or other violation of the said rights, and in our sole judgment to join you and/or others in whose names the copyrights to any of the works may stand; to discontinue, compromise or refer to arbitration, any such actions or proceedings or to make any other disposition of the disputes in relation to the works, provided that any action or proceeding commenced by us pursuant to the provisions of this paragraph shall be at our sole expense and for our sole benefit.

14. You agree that you, your agents, employees or representatives will not, directly or indirectly, solicit or accept payment from writers for composing music for lyrics or writing lyrics to music or for reviewing, publishing, promoting, recording or rendering other services connected with the exploitation of any composition, or permit use of your name or your affiliation with us in connection with any of the foregoing. In the event of a violation of any of the provisions of this paragraph 14, we shall have the right, in our sole discretion, by giving you at least thirty (30) days' notice by registered or certified mail, to terminate this agreement. In the event of such termination no payments shall be due to you pursuant to paragraph 8 hereof.

15. No monies due or to become due to you shall be assignable, whether by way of assignment, sale or power granted to an attorney-in-fact, without our prior written consent. If any assignment of such monies is made by you without such prior written consent, no rights of any kind against us will be acquired by the assignee, purchaser or attorney-in-fact.

16. All disputes of any kind, nature or description whatsoever arising in connection with the terms and conditions of this agreement, or arising out of the performance thereof, or based upon an alleged breach thereof, shall be submitted to arbitration in the City, County and State of New York under the then prevailing rules of the American Arbitration Association by an arbitrator or arbitrators to be selected as follows: Each of us shall by written notice to the other have the right to appoint one arbitrator, provided, however, that if within ten (10) days following the giving of such notice by one of us the other shall not by written notice appoint another arbitrator the first arbitrator appointed shall be the sole arbitrator. If two arbitrators are so appointed, they shall thereupon appoint the third arbitrator, provided that if ten (10) days shall elapse after the appointment of the second arbitrator and the said two arbitrators are unable to agree upon the appointment of the third arbitrator then either of us may, in writing, request the American Arbitration Association to appoint the third arbitrator. The award made in the arbitration shall be binding and conclusive on us and judgment may be, but need not be, entered thereon in any court having jurisdiction. Such award shall include the fixing of the cost of arbitration, which shall be borne by the unsuccessful party.

17. Any notice sent to you pursuant to the terms of this agreement shall be valid if addressed to you at the last address furnished by you in writing to our Department of Writer Administration.

18. This agreement cannot be changed orally and shall be governed and construed pursuant to the laws of the State of New York.

19. This agreement, as of its effective date, cancels and supersedes the agreement between us dated _____ and all modifications thereof therein called the "Superseded Agreement"). All works embraced by the Superseded Agreement shall be deemed embraced by this agreement.

It is agreed that any part of the advances heretofore made to you pursuant to the Superseded Agreement which shall not have been recouped by performances of your works up to the effective date of this agreement shall be deemed to be an advance against all monies which may become payable to you pursuant to this agreement and any extensions, renewals or modifications thereof, or substitutions therefor, for performances of your works in the United States and Canada.

Very truly yours,

BROADCAST MUSIC, INC.

ACCEPTED AND AGREED TO:

By _____

RESPONSES OF LESLIE ARRIES
TO QUESTIONS SUBMITTED BY SENATOR SPECTER

QUESTION

1. As I understand this legislation, there would be no licensing system at all, and indeed, there would be a buy-out on a one time basis of all the rights in the music. If this is so, how is the value of that music to be determined at that one time, when the producer of the show must decide how much the composer of the show's songs must be paid? Is any provision for continuing payment for continuing performance of the music, as exists now, being contemplated? If so, how would that provision fit into this legislation?

ANSWER

The assumption that, under S.1980, there would be a buy-out on a one-time basis of all music rights is incorrect. Nothing in the legislation mandates a one-time buy-out of the composer's rights.

In fact, if S.1980 were enacted, composers undoubtedly would be compensated just like all other creators who contribute to the total package - by a combination of up-front payments and continuing "residuals" which would flow back to them out of syndication revenues.

Under the system envisioned by S.1980 composers would be compensated as follows.

First, they would receive up-front payments for actual time expended just as they do now.

Secondly, instead of receiving ASCAP and BMI distributions, they would receive a percentage of the money stations pay to the studios for licensing the broadcast rights to the program, including the music. This percentage is called a "residual."

To use a hypothetical example, let's assume a local TV station is currently licensing the rights to broadcast Magnum P.I. for three years for a payment of \$10 million. After enactment of S.1980

the price might be \$10.3 million because it would be adjusted to reflect a payment for the music. The station would pay this amount, either in one lump sum or in installments, to the studio which is syndicating the program - in the case of Magnum P.I., this is Universal. When Universal received the station's payment, it would then issue a check for a percentage of that payment - say two percent, or \$20,600, to the composer.

This is the same system currently in use for contributors to other copyrighted elements of the program.

Under this system composers would clearly share in the continued popularity of a program and reap even more benefits than they now receive if a show containing their music becomes especially successful. This is because the payment to the composer would be based on the price actually paid for the show by the stations, not simply on the number of times the music is played, as is now the case under the ASCAP/BMI system.

During the last year television stations across the country paid 41 percent more for syndicated shows than the year before. If S.1980 had been law and composers had received a percentage of syndication fees in lieu of ASCAP/BMI payments, which are based on station's gross advertising revenues, composers would have shared in this enormous increase in the value of programs containing their music.

The kind of residuals system envisioned by S.1980 would clearly permit composers to share in the growth of the syndication business more than the present system. Far from receiving a one-time only payment up-front, composers, like other creators currently, would share directly in the ever-increasing value of popular shows over the years.

Opponents of S.1980 argue that, because the bill does not mandate the payment of residuals, the studios would refuse to pay them. This assertion ignores the fundamental economics behind the residuals system now in place for nearly all creators who contribute to production of TV programs: writers, actors, directors and others.

In fact, creators are paid residuals by the Hollywood studios because it makes economic sense to do so. By offering the creators a large portion of their compensation from future revenues which will be generated if a show goes into syndication after production costs are paid, the studio is able to secure essential creative talent with minimal up-front costs and low risks. If a show is a failure and never goes into syndication the creator will share the studio's negative risk - he or she will get nothing. If a show makes it into syndication, the creator will receive a handsome reward, but at no risk to the studio whatever.

Indeed, this principle underlies even the present ASCAP/BMI licensing system. It must be kept in mind that for 90 percent of the music affected by S.1980, the Hollywood studio, not the composer, is the actual copyright owner. Thus, the decision to license music through ASCAP and BMI and to permit the composer to receive his or her "residual" through those two organizations is a decision made by the studio, not by the composer. If the studio wished to force the composer into a one-time payment system, it could do so today, using its power as a copyright owner. The reason it does not choose to do so is the fundamental economic rationale for residual payments discussed above.

The real reason studios now choose to pay composer residuals through ASCAP and BMI today is that for every 50 cents paid to the composer, the studio receives an identical 50 cents for

itself through its music publishing subsidiary. It is this 50 cents which studios fear they might not be able to capture if required to negotiate directly with local broadcast stations. And, it is this 50 cents of the dollar which is the real focus of the reform contained in S.1980.

Local television stations have no quarrel with composers of the music in syndicated programs. They are more than willing to pay fairly for the music contained in the shows they license. They simply object to the method of payment, which permits the studios who own all of the rights in a show to avoid direct negotiation with the stations for the music rights.

To the extent that the Congress should decide to modify the legislation to assure that composers would have a statutory right to receive residual payments and to bargain collectively for minimum residuals, the All-Industry TV Music License Committee would have no objection.

QUESTION

2. You have stated that the principal beneficiaries of the current system are a small group of established Hollywood studios who account for the production and/or distribution of the bulk of syndicated television programming. Claims have also been made that these producers have their own affiliated music publisher and thus collect "double payments" for the musical product. Is it not true, however, that the payment to the production subsidiary is for the creation of a product which is separate and distinct from the efforts of the publishing affiliate? Do you take the position that there is no right to compensate for each of the different functions performed?

ANSWER

The sole inequity addressed by S.1980 is that payment for music performance rights for particular musical compositions in a syndicated program is not currently subject to the kind of marketplace negotiation which characterize the sale or licensing of all other copyrighted works used by local television stations.

In normal marketplace situations a supplier of goods and services is compensated according to the value of his or her contribution. This is not the case with regard to licensing of syndicated TV music to local stations. To the extent that a payment to a publisher subsidiary of a Hollywood studio reflects actual value for services provided, local stations are prepared to pay and will pay in a marketplace governed by competitive negotiation.

The reason that Hollywood studios fear a system of per-program negotiation for the services of their music publishing subsidiaries is that in most cases, the wholly-owned music publisher provides no real service, other than to collect the 50 cents on every dollar funneled through to them by ASCAP and BMI.

The traditional function of a publisher is to market music to many different users and types of users. Independent music publishers like Valentino, Inc. (which was represented at the hearing) aggressively market their composers' music to production houses, record companies, television and radio stations, producers of advertisements and other audio visual works. Many "real" publishers also publish sheet music.

To the extent that publishers perform valuable services they deserve a reward and the marketplace will provide it.

However, in the case of most of the "works-for-hire" which are affected by S.1980, the studio/publisher performs no real service. The studio hires the composer to compose the music, dubs the music into the video tape and then does nothing further with it. To the extent that publishing rights are assigned to another arm of the studio it is purely a paper transaction and should be paid for accordingly.

Were music performance rights to be bargained for on the basis of

each, separate syndicated program, the station would likely pay less for the publisher's performance right where that right as a practical matter reflected no real value. On the other hand, in the minority of cases where the studio/publisher had, in fact fully exploited a work - for example, marketed a top 40 recording of the music which creates a real public demand for it - stations could expect that a studio/publisher would demand and receive a higher price for the music performance rights.

The point is that in the kind of direct negotiations permitted under S.1980 the marketplace would assign a realistic value to that publishing contribution.

Under the current system all publishers are paid under exactly the same formula regardless of the extent of their true contribution to the marketing of a given piece of music.

The purpose of the copyright law is to provide a system of compensation in which each contributor to the creative process receives a reward in the marketplace proportionate to the commercial value of his or her contribution. S.1980 would apply this basic principle to publishers of the music contained in local syndicated TV programs.

Senator MATHIAS. Let me just say to the other members of the committee that we have not abandoned our light system but, by arrangement, this panel is dividing up their time.

Mr. ARRIES. I appreciate that, Mr. Chairman.

Senator MATHIAS. Mr. Fritts.

STATEMENT OF EDWARD O. FRITTS

Mr. FRITTS. Thank you, Mr. Chairman, I will try to give you back some change on your light system.

The National Association of Broadcasters represents all aspects of the broadcasting industry, television and radio, networks and local stations, affiliated stations, and independents.

S. 1980 directly affects only one part of NAB's membership, the 922 local commercial television stations across the country. However, enactment of the bill is supported by all segments of our association. This is because all of NAB's members are dependent on a

fair and efficient copyright system. Practices which impair that system threaten its effectiveness for all who use it.

My own background in broadcasting is in radio rather than television. And as a radio broadcaster, I too have had to secure blanket copyright licenses from ASCAP, BMI and SESAC in order to clear the performance rights to the music on my stations.

Because of this, I believe that I am in a good position to explain how the blanket licensing came into being, why it is used for many kinds of public performances of music, and why it is wrong for television.

First, let me note that, for comparative purposes, the medium most like television is the theatrical motion picture business. In fact, a good share of the programming shown on television today consists of feature length motion pictures.

But when the motion pictures are shown in local movie theaters, they are source licensed by Government order. In other words, the theater owner negotiates directly with the movie studio for the use of all the copyrights necessary to exhibit the picture in one package before the film is ever shown to the public. And that is what S. 1980 would do for television, and that is all it would do.

Movie theaters and copyright owners have used this system for nearly 40 years and it served them well.

As it applies to television programming, face-to-face price negotiations already take place between the local broadcaster and the program syndicator. With this process in place, S. 1980 includes only one additional element in the price negotiation scheme, and that is the music which, in fact, is already part of that program.

And why should not source licensing work well? After all, when the music associated with each and every show has been bargained for on its own terms, its value can be very quickly assessed in the marketplace.

Why then do we have another system for television today? Why do we bundle together copyrights to nearly all the songs that are in the world and require TV stations to buy the whole bundle when, in fact, they only need a few?

Here is where my radio background may help with the answer.

The first use of the blanket license in broadcasting was for radio. The program day of a typical radio station was traditionally an ad hoc affair with much spontaneity. Announcer request would pick a song from the shelf and put it on. It is virtually impossible to pre-program what live radio stations are going to select in the scheme of music.

So a system of blanket licensing for radio was necessary. Radio stations simply bought the blanket license from the three performing rights societies and played whatever they wanted on a pre-cleared basis. But, for some medium, like radio, it has been tolerated over the years because it seemed to be the only practical way the copyright system could work.

Local television today, however, is entirely different from radio. Prerecorded programs on television are just like movies in a movie theater. In fact, they are bargained for weeks, months and, in fact, even years in advance. The music contained in these programs is created by the employees of the studio which made the show. It is glued right on to the videotape along with the visual images of the

dialog long before that tape ever reaches the station. Why then is it necessary for TV stations to use a system which was developed for radio, which reflects the use of music which had no relevance to television? Why should not television be treated like the movies? Why should the same movie be treated differently in a local theater than it is on the television station?

Mr. Chairman, the answer is clearly that television music can and should be bargained for on a case-by-case basis, where the value of each and every show's music can be determined by the marketplace. This is the most effective way to make the copyright system work well, and all of that would be provided for with the adoption of S. 1980.

Thank you.

[Submissions of Mr. Fritts follow:]

PREPARED STATEMENT OF EDWARD O. FRITTS

SUMMARY

The current method of local TV music licensing under section 106 of the copyright law threatens the effectiveness of the copyright system for all who use it.

The system which would result from S.1980 is already used by movie theaters -- the entertainment medium most like television.

Under the system used in movies, music which is an important part of a show enjoys a higher value than that which plays a minor role.

The current system for local television, using the blanket license, was developed for media, like radio, which used music on a random, unplanned basis.

Music in syndicated TV programs is glued right into the program long before the tape is sold to the station. It can be sold along with all other rights in the tape. The use of a blanket license is not necessary.

Television should be treated like the movies. Music should be bargained for on a case-by-case basis, where the value of each and every show's music can be determined in the marketplace.

* * *

Mr. Chairman, on behalf of the National Association of Broadcasters I wish thank you and the Subcommittee for the opportunity to appear here today in support of S.1980, introduced by Senator Thurmond.

The National Association of Broadcasters represents all aspects of the broadcast industry: television and radio,

networks and local stations, affiliated stations and independents.

S.1980 directly affects only one part of NAB's membership, the 922 local commercial television stations across the country. However, enactment of the bill is supported by all segments of the Association. This is because all of NAB's members are dependent on a fair and efficient copyright system. Practices which impair that system threaten its effectiveness for all who use it.

Mr. Chairman and Members of the Subcommittee, my own background in broadcasting is in radio rather than television. And, as a radio broadcaster I too have had to secure blanket copyright licenses from ASCAP, BMI, and SESAC in order to clear the performance rights to the music on my stations.

Because of this, I believe that I am in a good position to explain how the blanket licensing system came into being, why it is used for many kinds of public performances of music -- and why it is wrong for television.

First, Mr. Chairman, let me note that the medium most like television is the theatrical motion picture business. In fact, a good share of the programming shown on TV consists of feature length motion pictures.

But, when motion pictures are shown in local movie theaters, they are source licensed by government order. In other words, the theater owner negotiates directly with the movie studio for use of all the copyrights necessary to exhibit the picture in one package before the film is ever shown to the public.

That is all that S.1980 would require -- for television.

Movie theaters and copyright owners have used this system for nearly 40 years and it has served everybody well.

As it applies to television programming face-to-face price negotiations already take place between the local broadcaster and the program syndicator. With this process in place, S.1980 includes only one additional element in the price negotiations -- which is the music already part of that program.

And, why shouldn't the source licensing system work well? After all, when the music associated with each and every show has to be bargained for on its own terms, its value can very quickly be assessed by the market place.

Music which is an important part of a show's appeal will enjoy a higher value. Music which plays a minor role will receive less. That kind of a system expresses what the copyright law is all about -- to give creators legal rights to receive compensation, and then let the market place take over to determine what that compensation should be.

Why then do we have another system for TV today? Why do we bundle together copyrights to nearly all the songs there are in the world, and require TV stations to buy the whole bundle when they only need a few?

Here's where my radio background may help with the answer. The first use of the blanket license in broadcasting was for radio.

The program day of a typical local radio station was traditionally an ad hoc affair. The music which provided the primary entertainment offered, consisted usually of a random selection of recorded tunes taken off the shelf and put on the platter at the whim of a disc jockey.

In this kind of system it was impossible, historically, to obtain advance permission of the copyright owner and negotiate payment on a case-by-case basis.

So, radio stations simply bought a blanket license from the three performing rights societies, and then played whatever they wanted on a pre-cleared basis.

Mr. Chairman, as many commentators, including the Register of Copyrights at the earlier House hearing, have observed -- this system was fraught with all kinds of anti-competitive problems.

But, for some media, like radio, it has been tolerated over the years because it seemed like the only practical way the copyright system could work.

Local television today, however, is a world apart from radio. Prerecorded programs on TV are just like movies in a movie theater. The music contained in these programs is created by employees of the studio which made the show. It is glued right on to the video tape along with the visual images and dialogue, long before that tape ever reaches the station.

Why, then, is it necessary for TV stations to use a system developed for their radio brethren, which reflects a use of music which has no relevance to television?

Why shouldn't television be treated like the movies? Why should the same movie be treated differently in a local theater than when it is broadcast by a local station?

Mr. Chairman, the answer is clearly that television music can and should be bargained for on a case-by-case basis, where the value of each and every show's music can be determined in the market place.

This is the most effective way to make the copyright system work well, and it is all that is provided by S.1980.

RESPONSES OF EDWARD FRITTS
TO QUESTIONS SUBMITTED BY SENATOR MATHIAS

QUESTION

1. The television networks, as well as individual television stations, are members of NAB. Since network as well as non-network stations both use predominately pre-recorded programming, why shouldn't S.1980 apply to network purchases as well? Why do you believe the networks should be treated differently than local stations under federal law?

ANSWER

S.1980 addresses solely the licensing circumstances of the local television stations. The stations are particularly victimized by the current system because of their inability to clear their music performing rights requirements with respect to syndicated programming. Networks have also raised objections to the use of music blanket licenses and one network has attempted to obtain relief through litigation.

It is noteworthy that the music license fees paid by the networks are but a fraction of those paid by local television stations -- even though the networks use more music, over an equivalent number of programming hours, and reach audiences during prime time hours. This fee disparity would seem to underscore the trapped circumstances of the local television stations which led them, through the All-Industry TV Music License Committee, to seek legislative relief. The NAB totally supports the effort of the All-Industry Committee. Should the networks seek legislation in the future we will be happy to provide the Committee with our views.

QUESTION

2. NAB also includes radio stations. Many stations now use "play lists". Disc jockeys are required to play from that list, which often includes as few as 30 records at a time. Do you think that when the record industry supplies a record to a radio station the provider should be compelled by federal law to provide the performance right too?

ANSWER

No. As I testified on April 9, radio and records are much different media from television, and the reforms contained in S.1980 are directed specifically at circumstances which are characteristic of use of syndicated television programs by local TV stations.

In the case of television programming, the producer of the audio-visual work is, in 90 percent of the cases, the owner of all of the performance copyrights embodied in the program, including the music. In all cases he or she owns the public performance right in the audio-visual work itself. In the 10 percent of cases in which the producer is not actually the owner of the music performance right, the producer nevertheless has had to obtain permission from the copyright owner to synchronize the music into the program. Therefore, the producer of a commercial audio-visual work is always in a position to clear easily all performance rights and convey them in a single transaction to a user such as a TV broadcaster.

This is completely different from the relationship between the record and radio industries - sound recordings have no public performance right under U.S. law. Therefore, the record company is never in a position to license any performance right to a user. Broadcast of sound recordings occurs in a manner totally independent of the record company which produces the recording.

To the extent that composers enjoy a public performance right when their works are aired on radio, it is a right belonging to them alone which is completely separate from any rights of the record company.

This is a complete contrast with music in syndicated television programs where the music performance right is one of a body of performance rights normally owned by the producer itself.

QUESTION

3. Some of your members are owners of more than one TV station. When such a multi-station owner purchased programming for more than one station would it be a "network" under your understanding of S.1980?

What if the multi-station owner produced programming for use on several of its stations, would this programming be supplied by a "network" or would this be local programming under your interpretation of S.1980?

ANSWER

No. It is our view that a network under S.1980 would be a network in the same sense that term is used in section 111 of the current Copyright Act, that is "television networks in the United States providing nationwide transmissions..." (emphasis supplied).

The second part of this question appears to be based on a factual misunderstanding. To the extent that any multi-station group or network produces programming itself, it already is in a position to clear directly music performance rights.

S.1980 deals only with prerecorded programming supplied to stations which is produced by others who are functioning as program producers, not networks.

RESPONSES OF THE NATIONAL ASSOCIATION OF BROADCASTERS
TO QUESTIONS SUBMITTED BY SENATOR LAXALT

QUESTION

1. Assume that S.1980 is enacted and five years later a television station without a blanket or per program license from ASCAP wants to air "Casablanca." How will the station be able to air this movie if the composer of one of the songs refuses to license the public performance?

ANSWER

Under S.1980, after a one-year transition period, the responsibility for clearing music performing rights in pre-recorded product becomes that of the program producers and syndicators. There are a variety of means by which those entities easily can obtain the necessary rights so that Casablanca or any other pre-recorded product can continue to be broadcast. To the extent, as is often the case, that the Hollywood studio already controls the copyrights to the music in the programming, there would be absolutely no problem in obtaining the music performing rights. To the extent that "outside" music is incorporated into the pre-recorded program, there are a number of options available to those entities to clear the music performing rights. One is to return to the music publisher or its agent from whom synchronization rights had been obtained to obtain music performing rights. In the CBS litigation with ASCAP, there is ample testimony to the effect that negotiations over such "music-in-the-can" would neither be unduly difficult nor would lead to "hold-ups" in terms of prices demanded. Yet another option available with respect to such "outside" music would be for the producer to deal directly with ASCAP and BMI to obtain a per program or similar license covering those programs for which direct negotiations with the copyright holders might prove to be difficult.

QUESTION

2. Proponents of S.1980 argue that the legislation was not meant to preclude residual payments for composers. How will the performances be monitored?

ANSWER

It is true that S.1980 does not preclude the payment of residuals to composers based upon the commercial success of pre-recorded programs. There is absolutely no problem with respect to monitoring performances to guarantee such payments. There are highly-skilled computerized operations, such as that conducted by Talent Payments Inc. in Los Angeles, which already monitor all other payment obligations under various guild and other arrangements incurred by the program producers. Thus, organizations like TPI already keep track of the numbers of syndicated runs of particular programs and automatically see to it that the scriptwriter, actor, musicians and everyone else receive the agreed-upon payments. The system works smoothly and at a low overall cost. All that would be necessary with respect to music performing rights would be that one additional program cost element be added to the computer program. Music performances would be monitored, accounted for, and paid for in precisely the same fashion as are all other program elements today.

QUESTION

3. Proponents of S.1980 argue that television stations should have source licensing just as movie theaters do. Opponents make two points in response; please respond.
 - (1) Senator Gore argued that the blanket license makes more sense in the television context than in the movie context because there are many more performances (potentially infringing) on television.
 - (2) The analogy between movie theaters/movie producers and distributors, and television stations/program producers and syndicators would be closer if program producers/syndicators shared in a station's gross receipts, just as movie producers/distributors share in gross box office receipts.

ANSWER

There is no meaningful basis for distinguishing the treatment of music performing rights as they are and have for 35 years been licensed for theatrical exhibition from the manner in which music

performing rights should be licensed for television exhibition. The argument that there are "more performances" on television to be licensed does not create a basis for distinction. Whether or not this is the case, the fact remains that the producers of the programs involved already negotiate with the copyright owners to secure synchronization rights for all of the music involved. The transactions, therefore, are already taking place, and all that would have to be added to the process would be the determination of prices for television performing rights. The notion that producers would invite infringement litigation over highly visible uses of music -- let alone music for which they are already in contact with the copyright owners -- is simply fanciful.

The additional claim that the motion picture theater model is different since producers/distributors share in gross box office receipts whereas producers/syndicators do not share in station gross receipts is likewise irrelevant. Producers/syndicators receive handsome compensation covering all of their program cost elements by pricing their product in each television market at whatever price the market will bear. From the staggering per-episode fees commanded by leading syndicated product in individual television markets, it is clear that the producers/syndicators would have absolutely no difficulty in covering whatever added costs they might incur in clearing music performing rights. The producers today cover the costs of all other creative elements in television programming, and this fact has not prevented the syndication business from being one of the most lucrative businesses in the United States. It is impossible that placing the small additional obligation on the producers'/syndicators' shoulders of obtaining music performing rights will turn such a bonanza into a chaotic business disaster.

QUESTION

4. If S.1980 is enacted, will a television station still need a blanket license? If so, would you expect there to be a carve-out for programs licensed at the source?

ANSWER

If S.1980 is enacted the sole situation in which a given television station might still desire a blanket license would be with respect to locally-produced programming. Even with respect to such programming, however, it is probable that very few stations would need a blanket license, since they would be in a position to select their own music and seek out local composers and local music production houses to meet their music needs on such programs. If, on the other hand, a station preferred to obtain a blanket license covering the music in such local programming, it would be in a position to negotiate a price for that license which reflects that station's ability to go elsewhere for its music needs in the event the requested blanket license fees are onerous. That ability is presently lacking, since the stations have nowhere else to turn to obtain the rights to the music in their syndicated programming.

With respect to any blanket license covering locally-produced programming, it would be desirable to have a carve-out for programs for which the stations are able to license music directly. Otherwise, if a station were to require a license for but one of its local programs, it would be faced with paying ASCAP and BMI a license fee based upon the revenues from all of its local programs -- an inherently unfair result.

QUESTION

5. What impact, if any, will passage of S.1980 have internationally?

ANSWER

S.1980 will not adversely affect either the licensing of **copyrighted music internationally or the performance of the works**

of foreign-based composers in the United States. By definition, this legislation pertains solely to performances of copyrighted music in the United States. Such practices as may be permitted by the copyright laws of other countries with respect to the performance of copyrighted music in those countries would be unaffected by the legislation. It is significant to note, in this regard, that indigenous efforts are underway in several foreign countries to bring the licensing of music performance rights in line with the approach adopted by S.1980.

As for the performance on United States television of works of foreign composers, S.1980 at most would require that the producer of the programs involved see to it that he obtains the necessary music performance rights authorizations when he contracts with foreign-based copyright owners. This already takes place with respect to motion picture theater performance rights in the United States and should likewise prove to be no problem with respect to local television performances.

Senator MATHIAS. Thank you, Mr. Fritts.
Mr. Padden.

STATEMENT OF PRESTON R. PADDEN

Mr. PADDEN. Mr. Chairman, my name is Preston Padden, and I am president of the Association of Independent Television Stations.

I appear here today because the present music licensing system imposes a substantial and totally unwarranted burden upon our stations.

The independents cannot supply programs by flicking a switch and riding a network. Our stations must negotiate in the syndication marketplace for the rights to almost all of the programs we broadcast. By the best available estimates, independent television stations account for 61 percent of all syndicated program sales.

Independent stations and program producers and distributors have a strong commonality of interest. But, despite our common interests, the basic forces of supply and demand in recent years have conspired to produce dramatic, potentially life-threatening increases in program costs for independent stations. This chart tells the story.

Two of the most important categories of program product for our stations are the off-network half hours and feature films. In the 3 years, from 1981 through 1984, our costs for off-network half hours increased a whopping 51 percent. And then, in just 1 more year, 1984 to 1985, those costs increased another 42 percent. As you can

see on the chart, our feature film costs have followed a similar and frightening pattern, an increase of 46 percent in just the last year alone.

Overall, television program syndicators grossed approximately \$2.65 billion in 1985, a 26-percent increase from the previous year. Universal recently sold the reruns of "Magnum, P.I." for \$200 million. One major market station alone paid \$15 million for the rights to those reruns. The popular game show, "Wheel of Fortune," is now grossing over \$70 million annually in the syndication marketplace, which is not bad for a series that costs about \$10 million to produce.

The truly galling aspect of our present program cost predicament is what brings me here today. It sounds hard to believe, but the fact is that even after we have paid these outrageously inflated and increased prices for our programs, we still cannot broadcast them.

The same station that paid \$15 million for "Magnum P.I." cannot run it. Not yet. Something has been stripped from the package, something called the music rights. Those are not included for the \$15 million. The music rights have been assigned to a third party, ASCAP or BMI. Now, you will not find their names on the station's license, but they have become in effect the station's partner. And until the station pays its tribute to the music licensing societies, all of these very expensive program investments are absolutely worthless.

What we have here is a system that is as unnecessary as it is wrong. Surely, within the king's ransom we pay for our programs, the necessary dollars can be found to cover the music that is incidental to those programs.

When the movie house buys a feature film, the music rights are included. But when that exact same film comes across the street to our stations, the music rights are extracted and must be purchased separately. And the stations have a right to ask why.

The answer is a sad truth: both the buyers and the sellers of television programs are prisoners of an outmoded antiquated anachronism—the blanket music licensing system. As a practical matter, the parties cannot break out of that system by themselves. As long as we continue to be required to obtain a blanket license for some of our programs, there is no financial incentive to pay additional sums for source license or preprogram licenses. Similarly, there is no incentive under the present system for any individual producer to clear music rights. We are all caught in a senseless and patently unfair procedure, which only the Congress can correct.

Mr. Chairman, the independent television stations have no desire to be at odds with the music composers, the music publishers, or the program producers. All are fine people, very important to the future of our business. Nor, for that matter, are we asking to be subsidized at anyone else's expense. We are willing to pay our way and that is demonstrated by the startling price increases we have paid for our programs. All that we are seeking is the chance to bargain and pay for music in a free and open marketplace. We want to pay for the honorable skills of music composers and publishers the exact same way that we compensate writers, directors, producers, electricians, animators, stagehands, set designers, cinematographers, editors, and others. We pay them for their work. We are not

required to make them our partners whose earnings go up as the result of our labor.

S. 1980 will give us that opportunity, the chance to continue to make our unique contribution of providing nonnetwork program services to all of the American people.

Thank you very much.

[Submissions of Mr. Padden follow:]

PREPARED STATEMENT OF PRESTON R. PADDEN

SUMMARY

Independent television stations must negotiate directly for all programs we broadcast. We account for 61 percent of all syndicated sales.

The cost of programming increased by 51 percent from 1981 through 1984. Last year alone these costs increased by 42 percent. Program expenses now consume one-half of gross revenues for many stations.

The program suppliers grossed \$2.65 billion in 1985 from selling syndicated shows. One show, Magnum P.I., grossed \$15 million from one station alone.

However, these statistics do not reflect the cost of the music in the shows. Music rights are withheld from programs and assigned to ASCAP and BMI to be licensed to us. Until our stations pay tribute to ASCAP and BMI our expensive program investments are worthless.

The sad truth is that both buyers and sellers of television programs are prisoners of this outmoded, anachronistic system -- the blanket licensing system.

As long as we are required to obtain a blanket license for some of our programs, there is no financial incentive for sellers to ask or buyers to pay additional sums for source licenses.

This system can only be corrected by Congress and S.1980 will give us that opportunity.

* * *

MR. CHAIRMAN, I THANK YOU FOR THE OPPORTUNITY TO APPEAR BEFORE THE SUBCOMMITTEE. MY NAME IS PRESTON PADDEN AND I AM PRESIDENT OF THE ASSOCIATION OF INDEPENDENT TELEVISION

STATIONS, USUALLY KNOWN BY THE INITIALS INTV. WE ARE A VOLUNTARY ASSOCIATION OF THE NATION'S INDEPENDENT TELEVISION STATIONS; THE STATIONS THAT ARE INDEPENDENT OF THE THREE NATIONAL TV NETWORKS. AS THEY USED TO SAY IN THE DODGE COMMERCIALS -- "WE'RE THE GOOD GUYS IN THE WHITE HATS."

INDEPENDENT TELEVISION STATIONS MAKE A UNIQUE CONTRIBUTION TO THE PUBLIC INTEREST BY OFFERING NON-NETWORK ENTERTAINMENT AND INFORMATION; BY PROVIDING PROGRAMMING ALTERNATIVES, FREE OF CHARGE; ON A NON-DISCRIMINATORY BASIS; WITHOUT EXPENSIVE SATELLITE DISHES OR MONTHLY CABLE BILLS. I APPEAR HERE TODAY BECAUSE THE PRESENT MUSIC LICENSING SYSTEM IMPOSES A SUBSTANTIAL AND TOTALLY UNWARRANTED BURDEN UPON OUR STATIONS.

OUR STATIONS CANNOT SUPPLY PROGRAMS BY FLICKING A SWITCH AND RIDING A NETWORK. OUR STATIONS MUST NEGOTIATE IN THE SYNDICATION MARKETPLACE FOR THE RIGHTS TO ALMOST ALL OF THE PROGRAMS WE BROADCAST. BY THE BEST AVAILABLE ESTIMATES, INDEPENDENT TELEVISION STATIONS ACCOUNT FOR 61% OF ALL SYNDICATED PROGRAM SALES.

OVER THE LONG HAUL, INDEPENDENT STATIONS AND PROGRAM PRODUCERS AND DISTRIBUTORS HAVE A STRONG COMMONALITY OF

INTEREST. BUT, DESPITE OUR COMMON INTERESTS, THE BASIC FORCES OF SUPPLY AND DEMAND, IN RECENT YEARS, HAVE CONSPIRED TO PRODUCE DRAMATIC -- POTENTIALLY LIFE THREATENING -- INCREASES IN PROGRAM COSTS FOR INDEPENDENT STATIONS. THIS CHART, WHICH IS BASED UPON A SURVEY CONDUCTED BY BUTTERFIELD ASSOCIATES FOR VIEW MAGAZINE, TELLS THE STORY.

TWO OF THE MOST IMPORTANT CATEGORIES OF PROGRAM PRODUCT FOR OUR STATIONS ARE THE OFF-NETWORK HALF HOURS AND FEATURE FILMS. OVER THE YEARS, FROM 1981 THROUGH 1984, OUR COSTS FOR OFF-NETWORK HALF HOURS INCREASED A WHOPPING 51%. AND THEN, IN JUST ONE YEAR, 1984-1985, THOSE COSTS INCREASED ANOTHER 42%. AS YOU CAN SEE ON THE CHART, OUR FEATURE FILM COSTS HAVE FOLLOWED A SIMILAR AND FRIGHTENING PATTERN -- AN INCREASE OF 46% IN THE LAST YEAR, ALONE.

TO PUT THESE PERCENTAGE INCREASES IN PERSPECTIVE, PROGRAM EXPENSES NOW CONSUME FULLY ONE-HALF OF THE GROSS REVENUES OF MANY OF OUR STATIONS. TO MAKE MATTERS EVEN WORSE, OUR REVENUES ARE INCREASING AT A MUCH SLOWER RATE THAN ARE OUR COSTS. THE RESULTING SQUEEZE ON OPERATING MARGINS THREATENS THE VERY EXISTENCE OF MANY -- PARTICULARLY THE NEWER -- STATIONS. OBVIOUSLY, WE IN THE INDEPENDENT TELEVISION BUSINESS COULD USE A LITTLE GRAMM-RUDMAN-HOLLINGS OF OUR OWN.

THE SELLER'S SIDE OF THE TELEVISION PROGRAM BUSINESS IS DOING A LITTLE BETTER. OVERALL, TELEVISION PROGRAM SYNDICATORS GROSSED APPROXIMATELY \$2.65 BILLION IN 1985 -- A 26 PERCENT INCREASE FROM THE PREVIOUS YEAR. UNIVERSAL RECENTLY SOLD SYNDICATION BROADCAST RIGHTS TO MAGNUM P.I. FOR \$200 MILLION. ONE MAJOR MARKET STATION, ALONE, PAID \$15 MILLION FOR THE RIGHTS TO THAT SHOW. THE POPULAR GAME SHOW, WHEEL OF FORTUNE, IS NOW GROSSING OVER \$70 MILLION ANNUALLY IN THE SYNDICATION MARKET, WHICH IS NOT BAD FOR A SERIES THAT COSTS ONLY ABOUT \$10 MILLION TO PRODUCE.

CURRENT POPULAR NETWORK SHOWS SUCH AS COSBY, CHEERS AND FAMILY TIES ARE EXPECTED TO BRING IN \$250 MILLION, OR MORE, EACH WHEN THEY ARE PURCHASED BY OUR STATIONS IN THE SYNDICATION MARKET IN THE NEXT FEW YEARS.

THE TRULY GALLING ASPECT OF OUR PRESENT PROGRAM COST PREDICAMENT IS WHAT BRINGS ME BEFORE YOU TODAY. IT SOUNDS HARD TO BELIEVE, BUT THE FACT IS THAT EVEN AFTER WE HAVE PAID THESE OUTRAGEOUSLY INFLATED AND INCREASED PRICES FOR OUR PROGRAMS, WE STILL CAN'T BROADCAST THEM.

THE SAME STATION THAT PAID \$15 MILLION FOR MAGNUM P.I. CAN'T RUN IT. NOT YET. SOMETHING IS MISSING FROM THE PACKAGE; SOMETHING CALLED THE MUSIC RIGHTS. THOSE ARE NOT INCLUDED FOR THE \$15 MILLION. NO. THE MUSIC RIGHTS HAVE BEEN ASSIGNED TO A THIRD PARTY -- ASCAP OR BMI. YOU WON'T FIND THEIR NAMES ON THE STATION'S LICENSE, BUT THEY ARE THE STATION'S PARTNER. THEY SHARE IN THE STATION'S ADVERTISING REVENUE. AND UNTIL THE STATION PAYS ITS TRIBUTE TO THE MUSIC LICENSING SOCIETIES, OUR VERY EXPENSIVE PROGRAM INVESTMENTS ARE ABSOLUTELY WORTHLESS.

WHAT WE HAVE HERE IS A SYSTEM THAT IS AS UNNECESSARY AS IT IS WRONG. SURELY, WITHIN THE KING'S RANSOM WE PAY FOR OUR PROGRAMS, THE NECESSARY DOLLARS CAN BE FOUND TO COVER THE MUSIC THAT IS INCIDENTAL TO THOSE PROGRAMS. TO DEMONSTRATE JUST HOW UNNECESSARY THE SYSTEM IS, TAKE A LOOK AT MOVIE THEATERS. WHEN THE MOVIE HOUSE BUYS A FEATURE FILM, THE MUSIC RIGHTS ARE INCLUDED. BUT WHEN THAT EXACT SAME FILM IS SOLD TO OUR STATIONS, THE MUSIC RIGHTS ARE EXTRACTED AND MUST BE PURCHASED SEPARATELY. THE STATIONS HAVE A RIGHT TO ASK, "WHY?" WE KNOW THAT NO GROTESQUE BURDEN IS IMPOSED ON COMPOSERS WHEN THEIR MUSIC IS LICENSED AT THE SOURCE FOR

THEATRICAL EXHIBITION. WHY THEN SHOULD ANY SUCH BURDEN BE PRESUMED TO FLOW FROM SOURCE LICENSING FOR OUR STATIONS?

THE ANSWER IS A SAD TRUTH: BOTH THE BUYERS AND THE SELLERS OF TELEVISION PROGRAMS ARE PRISONERS OF AN OUTMODDED, ANTIQUATED ANACHRONISM -- THE BLANKET MUSIC LICENSING SYSTEM.

AS A PRACTICAL MATTER, THE PARTIES CANNOT BREAK OUT OF THAT SYSTEM BY THEMSELVES. AS LONG AS WE CONTINUE TO BE REQUIRED TO OBTAIN A BLANKET LICENSE FOR SOME OF OUR PROGRAMS, THERE IS NO FINANCIAL INCENTIVE TO PAY ADDITIONAL SUMS FOR SOURCE OR PER-PROGRAM LICENSES. SIMILARLY, THERE IS NO INCENTIVE UNDER THE PRESENT SYSTEM FOR ANY INDIVIDUAL PRODUCER TO CLEAR MUSIC RIGHTS. WE ARE ALL CAUGHT IN A SENSELESS AND PATENTLY UNFAIR PROCEDURE, WHICH ONLY THE CONGRESS CAN CORRECT.

MR. CHAIRMAN, THE INDEPENDENT TELEVISION STATIONS HAVE NO DESIRE TO BE AT ODDS WITH THE MUSIC COMPOSERS, THE MUSIC PUBLISHERS OR THE PROGRAM PRODUCERS. ALL ARE FINE PEOPLE, IMPORTANT TO THE FUTURE OF OUR BUSINESS. NOR, FOR THAT MATTER, ARE WE ASKING TO BE SUBSIDIZED AT ANYONE ELSE'S EXPENSE. WE ARE WILLING TO PAY OUR WAY AND THAT IS DEMONSTRATED BY THE STARTLING PRICES WE PAY FOR PROGRAMS. ALL THAT WE ARE SEEKING IS THE CHANCE TO BARGAIN AND PAY FOR

MUSIC IN A FREE AND OPEN MARKETPLACE. WE WANT TO PAY FOR THE HONORABLE SKILLS OF MUSIC COMPOSERS AND PUBLISHERS THE EXACT SAME WAY THAT WE COMPENSATE WRITERS, DIRECTORS, PRODUCERS, ELECTRICIANS, ANIMATORS, STAGEHANDS, SET DESIGNERS, CINEMATOGRAPHERS, EDITORS AND OTHERS. WE PAY THEM FOR THEIR WORK. WE ARE NOT REQUIRED TO MAKE THEM OUR PARTNERS, WHOSE EARNINGS GO UP AS THE RESULTS OF OUR LABOR INCREASE.

S. 1980 WILL GIVE US THAT OPPORTUNITY, THE CHANCE TO CONTINUE TO MAKE OUR UNIQUE CONTRIBUTION OF PROVIDING NON-NETWORK PROGRAM SERVICES TO ALL OF THE AMERICAN PEOPLE.

STATEMENT OF THE ALL-INDUSTRY
TELEVISION STATION MUSIC
LICENSE COMMITTEE;
THE NATIONAL ASSOCIATION OF BROADCASTERS;
AND THE
ASSOCIATION OF INDEPENDENT TELEVISION STATIONS

INTRODUCTION

S.1980 addresses a very limited trade practice which has had adverse effects on copyright users and owner alike and which, if permitted to continue, is certain to breed widespread disrespect for our system of copyright protection.

For more than 35 years, local television broad-casters have obtained the right to broadcast music on their non-network programming through the device of blanket licenses issued by three organizations -- ASCAP, BMI and SESAC. ASCAP and BMI between them license over 95 percent of commercially used music. SESAC is a much smaller licensing organization.

The blanket license is an inherently anticompetitive device which insulates individual copyright owners from the normal give-and-take which characterizes negotiation over copyright and other rights in properly functionin markets. As the blanket license is used in television, the undeniable fact is that music copyright owners are not required to -- and do not today -- engage in any price negotiations concerning the licensing of music performing rights for broadcasts.¹ This is a

¹ As the courts and the Department of Justice have repeatedly observed: "There is no price competition between separate musical compositions" under the blanket license system. CBS v. ASCAP, 629 F.2d 930, 935 (2d Cir. 1980); see also BMI v. CBS, 441 U.S. 1, 32 (1979) (Stevens, J. dissent); Brief for the United States as Amicus Curiae in CBS v. ASCAP, U.S. Court of Appeals for the Second Circuit, on remand at 16-17 (herein "Government Brief").

total anomaly, for there is no other television program element which has been so protected from market forces. Indeed, the current system as applied to the program format of local television stations has no legitimate justification -- for it is conceded that a price-competitive, alternative system could and would function, in ASCAP's own words, like "well-oiled machinery," in the absence of the blanket license.

S.1980 would bring about just such a competitive market system in place of the current, non-competitive blanket license system -- a system which at one time may have been a necessary evil if copyright owners were to be compensated, but which is no longer needed. The kind of limitation on the monopoly powers of copyright owners which is contained in S.1980 is nothing unusual under the copyright law. While § 106 of the law gives broad powers to copyright owners, the eleven sections which follow all contain limitations on those powers which are designed to make the system work fairly and efficiently. Every one of these existing restrictions is more onerous to the copyright owner than the additional restraint which would be created by S.1980.

S.1980, in contrast, simply requires marketplace bargaining for a limited category of copyrighted works -- music in pre-recorded television programs. As a practical matter, the legislation contemplates that the business entities which produce and distribute such programming, and which are responsible for the selection of the music contained therein, will obtain from the very same copyright owners from whom they are already typically obtaining all other copyright rights in the music, the single additional right to have that music broadcast by the local television stations. There would be but one more element to be added to a negotiating process that is already occurring between the program producer and the copyright owner. Critically, by

dealing with one another at this point in the process, producers and copyright owners would arrive at price levels for the grant of these rights which reflect the value of the music to a particular program in the marketplace.

Under the existing blanket license system, in contrast, the value of music performing rights for local television broadcast is wholly artificially determined. Copyright owners do not negotiate over the value of these rights with the program producers. They instead authorize the performing rights societies to issue blanket licenses to local television stations, the fee for which is determined, in the case of ASCAP and BMI, as a percentage of the stations' total advertising revenues.² What is more, the blanket license requires the broadcasters to pay a fee for all the compositions in the ASCAP/BMI/SESAC repertories -- irrespective of the amount of music actually contained in their programming, the quality of that music, or its value to the broadcasters in attracting audience and selling advertising time.

The consequence of the present system is to force broadcasters to pay a revenue "tax" for their blanket licenses just as if they were dealing with Uncle Sam. No other program elements are paid for in such fashion. The resulting license fees reflect this unique bonanza: In 1986, the license societies stand to receive in excess of \$100 million in license fees from local television broadcasters. And, as we discuss below, these fees are for music which is generally of incidental importance to the overall programming itself.

The unfairness of the current system is not limited to its impact upon the local television broadcasters. The system is

² In the case of SESAC, fees are prescribed based upon a combination of the broadcasters' advertising "rate cards" and their market size.

equally unfair to the vast majority of ASCAP/BMI/SESAC composers and publishers who today stand little chance of having their music performed on local television. Indeed, a scant 6% of all composers receive 95% of all amounts distributed by ASCAP and BMI for television; just 2% of all publishers receive 91% of ASCAP/BMI television distributions to publishers. As we also discuss below, were music performing rights subjected to normal market forces, opportunities for the selection and use, by producers and local television stations alike, of an expanded array of works created and licensed by a broader spectrum of composers and music publishers would proliferate.

As the data reveal, and contrary to the notion advanced by critics of the legislation, the present system confers benefits on but a few privileged composers. The system does, however, confer enormous benefits upon a small group of corporate entities which play no productive role in furthering the interests sought to be advanced by our copyright system. These principal beneficiaries of the current system are none other than a small group of established Hollywood studios who account for the production and/or distribution of the bulk of syndicated television programming.

Taking full advantage of ASCAP's and BMI's established practice of distributing equally to composers and music publishers the proceeds of television licensing receipts, these major studios have garnered the lion's share of music publishing royalties from television through arrangements with hand-picked composers by which the studios share in music license proceeds from television through the establishment of music publishing operations affiliated with the studios. Indeed, for a recent year, 13 of the top 15 ASCAP publishers and 14 of the top 15 BMI publishers, in terms of television distributions, were subsidiaries of, or otherwise affiliated with, producers of

syndicated programming. These studios' grip on the syndication market is so strong, and the benefits which they receive from perpetuation of the current blanket license system so large, that they will not voluntarily budge to accommodate their customers' -- the Stations' -- long-expressed desire to be freed of the economic burdens of the blanket license and to benefit from a competitive licensing system. These studios likewise have little concern for the impact which the blanket license system has had on the non-favored composers who remain non-participants in the "kickback" arrangements between the studios and a select group of composers. S.1980 will refine the copyright law to eliminate this abuse and permit the system to function more efficiently, to everyone's benefit.

I. THE CURRENT SYSTEM

A holder of a copyright in a musical composition has a number of exclusive rights, including the right to perform the composition publicly. 17 U.S.C. § 106(4). Copyright protection for public performances of music dates from 1895. Prior to that time anyone could perform music without obtaining the approval of a "copyright owner." The 1895 amendment created a need for some means of granting this permission and for compensating copyright owners. Since, in that era, nearly all public performances were live and the exact music to be used was not known in advance, a mechanism -- the blanket license -- was devised to permit easy clearance for the user and compensation to the copyright owner.

In 1914, a single organization, ASCAP, was created which licensed for a single fee all musical compositions of all composers and publishers. Obviously, this created problems of

price-fixing,³ but there was no other reasonable way at the time to make the new public performance right work.

Even today, many public performances of copyrighted music might well go undetected, and unpaid for, in the absence of some blanket licensing technique. Examples of such public performances are found in night clubs and, to some degree, in radio, where unplanned uses of music -- "the disk jockey's itchy finger" -- necessitate blanket licensing if "the commerce anticipated by the Copyright Act ... [is to] exist at all." BMI v. CBS, 441 U.S. 1, 19 (1979). In such circumstances, the acknowledged anticompetitive potential of the blanket license may be outweighed by its "market making" function.

Television in the 1940's consisted predominantly of

³ The blanket license, an arrangement whereby otherwise competing entities (i.e., composers and publishers of music) pool their products (i.e., their copyright performing rights) such that those products may be sold at one "blanket" price, has long been recognized to have serious anticompetitive potential. As the Department of Justice has noted, such license form represents a "substantial deviation" from competitive market norms. See Government Brief at 16. Given this potential, it is not surprising that ASCAP, BMI and SESAC have been repeatedly sued on antitrust grounds.

The Department of Justice first brought suit against ASCAP as early as 1934, bringing another suit against ASCAP and BMI in 1940 -- the latter resulting in initial consent decrees which attempted to regulate the most blatantly anticompetitive practices of these licensing organizations

ASCAP was again sued in 1947 -- this time by motion picture exhibitors -- who were ultimately afforded injunctive relief from ASCAP's extension of the blanket license to movie theatres. Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948), relief, 80 F.Supp. 900 (S.D.N.Y. 1948). The court determination in Alden-Rochelle resulted in modification of ASCAP's initial consent decree to require that motion picture theatre performing rights be licensed by the motion picture studios "at the source." This is precisely the competitive licensing model sought to be brought about by the instant legislation.

Other groups of licensees have similarly sought relief from the anticompetitive sting of the blanket license. See Buffalo Broadcasting Co., Inc. v. ASCAP, 546 F.Supp. 274 (S.D.N.Y. 1982), rev'd, 744 F.2d 917 (2d Cir. 1984), cert. denied, 105 S.Ct. 1181 (1985) (local television stations); CBS v. ASCAP, 400 F.Supp. 737 (S.D.N.Y. 1975), rev'd, 562 F.2d 130 (2d Cir. 1977), rev'd sub nom., BMI v. CBS, 441 U.S. 1 (1979), on remand, 620 F.2d 930 (2d Cir. 1980), cert. denied, 450 U.S. 970 (television networks); K-21, Inc. v. Gershwin Pub. Corp. 372 F.2d 1 (9th Cir. 1967), cert. denied, 389 U.S. 1045 (1968) (radio).

live programming. It was in this context that the license patterns which persist to this day were developed. Specifically, the ASCAP and BMI television licenses were patterned directly after the blanket license arrangements existing in the radio industry. The local broadcasters were licensed with respect to all performances of music on their non-network programming⁴, for a fee calculated as a percentage of their total advertising revenues.

But any resemblance -- real or anticipated -- that television bore to radio during that early era quickly evaporated. Television shifted to a largely pre-recorded format, and whatever virtues the blanket license may offer to users requiring spontaneous access to literally millions of compositions became, for local television broadcasters, a licensing misfit -- and an extraordinarily expensive one at that.

For where a market can function quite adequately without blanket licensing -- i. e., where music rights can be individually and directly negotiated in advance (as, for example, between syndicated program producer and the copyright owner) -- the justification for this licensing technique is eliminated. But as we now describe, the ingenious system developed and perpetuated between and among the licensing societies and the major producer-syndicators for the licensing of syndicated television programming has ensured that the blanket license will be the sole viable license technique for local television broadcasters and that the benefits of an otherwise available competitive market alternative will be denied them.

⁴ The music on programming originated and transmitted to so-called network-affiliated stations by the three television networks (ABC, CBS, NBC) -- network programming -- has been the subject of separate licensing arrangements between the societies and each of the networks. H.R. 3521 addresses solely the licensing of music on the remaining non-network programming -- which occupies a considerable part of the total program day for network-affiliated stations, of which there are some 600, and the entire broadcast day for some 250 independent broadcasting stations.

The stations' non-network programming covered by the licensing societies' blanket licenses is composed of syndicated and locally-produced programs. As much as 35% of the program fare of a network-affiliated station, and 85% of the program fare of an independent station, consists of syndicated programming. Examples of such programs are game shows such as Wheel of Fortune and Jeopardy, situation comedies such as Benson and Three's Company, magazine-format shows such as PM Magazine, and theatrical motion pictures. Much of this syndicated program fare has previously been broadcast on a network prior to being licensed in syndication ("off-network programming").

Under the current blanket license system, when a syndicated television program is licensed to a local station for broadcast, a payment is negotiated between the syndicator and the station which includes the transfer of all rights necessary for the broadcast of that program except one -- the right to broadcast the music on the soundtrack. That right is specifically withheld so that stations will be forced to obtain blanket licenses from ASCAP, BMI and SESAC. As a result:

- instead of paying one package price to the syndicator for all broadcast rights -- including music -- the stations are required to obtain an incomplete product which, without the accompanying purchase of blanket licenses, is economically valueless since it cannot be broadcast;
- instead of benefiting from a licensing system in which the program packager acquires music performing rights in the normal course and in a competitive environment, the stations are required to pay a percentage of

their total advertising revenues to the societies -- uniquely making the societies the stations' economic partners;

- instead of acquiring and paying for the rights solely to those musical works which they in fact use, the stations are required to pay for access to literally millions of compositions in the societies' repertoires for which they have no need and which they do not use.

In short, what this remarkable system so simply and completely accomplishes is the elimination of face-to-face competition for television music performing rights between buyer (the producer) and seller (the copyright owner) at the only point in time when it can take place. Why negotiate in this fashion when these rights can instead be licensed non-competitively through the ASCAP/BMI blanket licenses?

How has this unique insulation of music rights from the give-and-take of the competitive marketplace come about and why, if the broadcasters sincerely view the system as inequitable, have they been unable to bring changes about short of legislative intervention?

The answers are not difficult to supply -- although the vested interests opposing the legislation attempt to cloud the facts and portray a different marketplace than actually exists.

II. THE BENEFICIARIES OF THE CURRENT SYSTEM AND WHY LOCAL TELEVISION BROADCASTERS CANNOT BRING ABOUT VOLUNTARY CHANGE

The local television broadcasters have tried in vain

for more than 25 years to shake loose from the blanket license as applied to their syndicated programming.⁵ But every effort by the stations to achieve licensing alternatives which would inject some degree of competition into the licensing of music performing rights has been thwarted, both by the societies and by the principal beneficiaries of the current system.

Producer Source Licensing

The most desirable and logical alternative to the blanket license would involve the syndicated program suppliers obtaining music performing rights at the source in their ongoing dealings with composers. However, a combination of the structure and operation of the syndication market, and the intimate ties which the leading producer-syndicators have to the licensing societies through affiliated music publishing operations, preclude individual local television broadcasters from obtaining such a marketing alternative.

⁵ It is grossly inaccurate to suggest that the local television stations have willingly embraced the blanket license through the years. To the contrary, the broadcasters have mounted repeated efforts -- at the bargaining table and in the courts -- to achieve competitive licensing alternatives. These efforts have taken various forms.

The local television stations attempted, in 1961, to get ASCAP to offer an entirely new form of blanket license -- one which would have excluded pre-recorded, syndicated programming from its coverage, in order that producer source licensing of television performing rights for such programs might emerge. When ASCAP refused even to negotiate over this proposed form of license, the stations filed a court proceeding under ASCAP's consent decree -- the Shenandoah proceeding -- which sought an order directing ASCAP to issue the requested new form of license.

This application for relief was ultimately denied in 1964, following which the stations continued to seek, in negotiations with ASCAP and BMI, similar licensing reforms. The societies have steadfastly refused to provide viable licensing alternatives to the entrenched blanket license.

This unyielding posture led the stations to initiate a class action antitrust litigation in 1979 -- the Buffalo Broadcasting case -- in which the stations were successful after trial only to be rebuffed based upon the Court of Appeals' hypothesized view of market options at odds with the reality.

Basic Market Facts

A relatively few major producer-syndicators control a significant portion of all syndicated product, and a dominant portion of the most desired syndicated product. Close to two-thirds of the current top-rated syndicated shows are distributed by seven major companies, namely: Viacom Enterprises, MCA/Universal, Columbia Pictures Television, Paramount Television Distribution, Warner Bros. Television Distribution, Twentieth Century-Fox Television and MGM/United Artists Television. Additionally, the distribution rights to 27 of 40 network series (and 14 of 17 popular half-hour series) slated for syndication in the next five years -- the syndication market's future "hot properties" -- are controlled by six of the major producer-syndicators.⁶

These major producer-syndicators have consistently accounted for a substantial part of all syndicated series distribution (off-network and first-run) -- cornering 48 percent of the overall market in 1981.⁷ The majors have also been the leading distributors of motion pictures produced initially for theatrical exhibition, accounting for 65-80 percent of all theatrical movies distributed for television exhibition.

If market shares for off-network, first-run and motion pictures are considered together, the majors have consistently accounted for 55-60 percent of all syndicated distribution.

⁶ Further exemplifying the control of desirable product by these major syndicators: eight of the ten top-rated network programs for the first week of January, 1986 are programs headed for syndication, and six of these eight -- shows such as Cosby, Cheers, Family Ties and Miami Vice -- have distribution rights controlled by four of these seven major producer-syndicators.

⁷ In that same year, the majors accounted for 82 percent of the most desirable, i.e., off-network, syndicated programs.

What is the prospect that a local television broadcaster in Waco, Texas, or Atlanta, Georgia, or Pocatello, Idaho, can demand and secure music performing rights in its market from these majors? There is no need to speculate. For the dominant producer-syndicators have gone on record in response to just such requests. Those responses speak volumes as to the entrenched, comfortable and unyielding nature of the current system. They reflect so fundamentally why this legislation is needed.

Thus:

- o For MCA, there is:

"nothing in it."

- o For Viacom, it is:

"not ... feasible ... to clear music performance rights licenses at the program supplier level." To do so, it noted, was "not current industry practice."

- o Columbia has found itself:

"unable to agree to your proposal that it obtain music performance licenses."

- o Paramount has maintained:

"Your suggestion ... to clear music ... 'at the source' is impractical."

- o Warner has found:

"questions ... [as to] the economic benefit ... to be derived by Warner."

o United Artists found itself:

"unable ... in the foreseeable future to change the framework and nature of [our] licensing agreements," expressing its hope that "this issue will remain closed for ... all future negotiations," and that ASCAP and BMI would thereby continue to receive "their rightful share of [local stations'] gross receipts."

o From Twentieth Century Fox:

"Fox is not interested in changing the manner in which we are currently doing business with our various licensees.... 'No' is the response ... consider it given."

o MGM is:

"[not] willing to change the way we do business," finding source licensing "a mammoth task doomed to failure from the outset."

These responses, which totally belie claims by such entities prompted by this legislation that they would willingly provide such rights "if only the stations would ask," are hardly surprising. For they reflect not merely the powerful position of the majors in the syndication market, but also, more generally, the overall state of what is a lucrative seller's market.

The reality is that television stations compete fiercely for syndicated programming, not only with each other, but with other entertainment forms (e.g. cable, pay-cable, videocassettes, etc.) as well. There is simply not enough desirable syndicated product to go around -- creating the quintessential "seller's market." As one trade publication recently put it (unwittingly right on the mark): "The sellers are calling the tune." They are calling the tune both on movie packages -- whose prices have reportedly increased 10-15 percent in the last year alone -- and on off-network programming, where sitcoms are demanding the highest per episode fees ever -- a record \$15 million having recently been paid by one major-market station to acquire the rights to Magnum P.I. Film packages are being sold for \$300,000 per title in Los Angeles, where Columbia recently demanded -- and got -- \$8,000,000 for a 26-film package. Syndication's future "hot properties" -- shows such as Cosby, Cheers and Family Ties -- are expected to gross \$250 million or more each when they enter into syndication during the next few years.

Overall, television program syndicators were expected to gross an estimated \$2.65 billion in 1985 -- a 26 percent gain in revenue from the previous year. And while the costs and risks of program production are frequently cited by critics of the legislation⁸, evidence abounds that the syndication business is regarded as an extremely profitable enterprise. Walt Disney Productions' recently-announced entry into the syndication market serves as an illustration. Analysts have predicted that Disney's new operation will become "a new wonderful world of revenue" for the company and that its two inaugural offerings (a 25-film package and 178 episodes of "Wonderful World of Disney") will

⁸ These factors, in any event, may be overstated. For example, the New Newlywed Game, in its first year of syndication in 1983, is projected to gross \$27 million and earn \$20 million -- the company having spent a mere \$2.7 million to produce 175 episodes.

reap at least a combined \$200 million. Similar evidence of the "bullish" view of the prospects of sellers in the syndication market is found in the stock market's response to syndication companies which have recently gone public. To cite but one example, the stock of King World Productions (distributor of Wheel of Fortune) increased more than six-fold, including a split, since it went public a year ago.

There is, moreover, rabid competition among local television stations for syndicated programming. This competition is in large part a result of: (1) the rapid growth in the number of independent television stations which -- having numbered just 73 in 1972 -- today total 250, and (2) the shrinking amount of available off-network programming. The latter phenomenon is the product of longer life spans for successful network shows, the emergence of fewer network hits, and the networks' growing impatience to cancel shows -- making it increasingly difficult to keep programs on the air long enough to create the number of episodes required to syndicate a program successfully.

This state of affairs -- whether viewed as "the already fat getting fatter" (Variety) or "program suppliers getting more powerful and ambitious all the time" (Television International) -- makes clear the upper bargaining hand which is enjoyed by the syndicators. The numbers again speak for themselves, witness:

- o King World Productions' recent demand of a 400 percent increase in license fees for syndication's top-rated Wheel of Fortune in a given television market;
- o A new Paramount film package (which includes "Flashdance," "Officer and a Gentlemen" and

"Heaven Can Wait") which recently sold for an estimated \$300,000 per title in the Los Angeles market;

- o Advertising Age's report on the five-fold increase in the cost of acquiring syndicated programming in the Los Angeles market;
- o Paramount's syndication sale of Webster for a total of \$140 million, and its expected gross of close to \$250 million each from Cheers and Family Ties, scheduled for syndication next year.

The Producer-Syndicators' Vested Interests in the Current System

More than simply the foregoing market factors ensure that no voluntary move to source licensing by the producer-syndicators will occur. At least as important is the significant financial stake the important producer-syndicators have in retaining the status quo.

The way the system works is again very simple. Most of the music contained in syndicated programming is so-called theme and background music largely incidental to the programming itself. The current leading syndicated programs, such as Wheel of Fortune, Jeopardy and The New Newlywed Game, are self-evidently not music-intensive programs, and aptly illustrate the insignificant role which music plays in many syndicated programs.

The music for such programs is typically contracted for by the producer through engaging a composer-for-hire who assigns to the producer who, in turn, transfers to the producer's in-house music publishing company, all of the copyrights to the

music. The composer is paid an up-front fee covering the creation and orchestration of, and the synchronization rights for, the music. The composer, by agreement with the producer, retains the right to receive from whichever rights organization with which it is affiliated the composer share (i.e., 50%) of the distributions attributable to performances of the composer's work. The remaining 50% distribution -- that of the music publisher -- goes to the producer's in-house affiliate.

Fully 90 percent of the music contained in syndicated programming constitutes such "composer-for-hire" music; the result is that the vast majority of the tens of millions of dollars in annual payments made by ASCAP and BMI to publishers for performances of music in syndicated television programs actually go to the in-house publishing arms of producer-syndicators. Significantly, these so-called "music publishers" do not perform the role of promoting composers' works for record sales and the like -- a role associated with the traditional music publisher; instead, essentially for doing nothing other than registering with the music licensing societies, these "publishers" rake in an unjustifiable bonanza in music licensing royalty payments financed by the television industry.

Under the current system, then, the typical producer not only avoids having to bargain for music performing rights, but it also stands to earn a tidy profit from the blanket license payout it (or its music publishing affiliate) will receive from ASCAP and/or BMI.

When the very same entities which control a substantial portion of the syndication market also receive -- through their ASCAP and/or BMI publishing companies -- substantial economic benefits from the royalty distributions of these societies, the already negligible chance that a local

television broadcaster can bring about voluntary modification of the licensing status quo is reduced to zero.

The producer-syndicator interests argue that the monies earned from publishing affiliates do not approach the amounts earned from program syndication and thus presumably would not affect their willingness to acquire the rights on the stations' behalf. This argument deliberately misses the point: The producer-syndicators do not face an either-or choice. They can refuse to license at the source, and thereby continue to collect royalties from the societies, while still selling their programming. They can, in effect, receive "something for nothing" -- why give up effortlessly obtained income? The market does not require that they do otherwise.

The Absence of Other Alternatives to the Blanket License Under Current Law

In deriding the importance of this legislation, the vested interest groups cite the supposed availability of a series of "alternatives" purported to be "freely available" to the stations in place of the blanket license. The first, voluntary producer source licensing, has been shown above to be unattainable given the market realities and the entrenched relationships between producer-syndicators and the licensing societies.

The second claimed alternative is, amazingly, the pursuit of direct licensing arrangements between some 800 local television stations and all of the composers and music publishers whose works are performed on television. The fact is that everyone, from ASCAP's former General Counsel to its own in-house economist, has admitted that individual local television stations cannot realistically pursue such direct licensing. ASCAP's own

witnesses conceded, during the course of the Buffalo Broadcasting litigation, that direct licensing would be "impossibly difficult and expensive." There is simply, as ASCAP's General Counsel of 40 years put it, "no practical way ... for an individual writer or publisher to work out licensing arrangements with an individual broadcasting station."

Finally, it is said that the stations can select the per program form of license from ASCAP or BMI if they are dissatisfied with the blanket license. This astounding assertion is made in the face of more than 30 years of efforts by the societies to deny such licenses to the broadcasters and in the face of ASCAP's very recent assertion that the per program license alternative "was never contemplated" And is not now intended for "the run of the mill station." Acting on this belief, ASCAP has in the past several months offered the local television broadcasters a per program license at a rate more than seven times as expensive as the blanket license -- with the full expectation that this will discourage its use by any broadcasters.

But even more fundamentally, the per program license is but another form of blanket license. It does not afford the local television broadcasters, non-affiliated music publishers or composers any greater opportunity to achieve the benefits of competitive licensing with respect to syndicated programming. So long as an ASCAP or BMI license -- blanket or per program -- represents an available alternative for the licensing of music on syndicated programming, the producer-syndicators will have no incentive -- and no need -- to acquire the rights directly from the copyright holders on the stations' behalf.

III. WHY THIS LEGISLATION IS NECESSARY

Assuming the broadcasters cannot escape the current system without the aid of Congress, would S.1980 provide a better

and fairer system? There are a multitude of reasons why it would.

First, music performing rights will be taken off of their present pedestal and placed on equal footing with every other creative element which goes into the production of television programming. Music rights should not be exempt from the give-and-take of the marketplace any more than any other copyright or other rights, nor should creators of music be insulated from competing with suppliers of other program elements for their fair share of scarce production resources.

This Bill would force music to become an issue in a producer's cost calculus -- and at the syndication bargaining table. Music will no longer be something paid for by an artificially contrived formula which bears no relationship to the quality or importance of the composition being licensed. Producers will finally be compelled to focus on how much they are paying for the musical component of a program vis-a-vis other essential inputs, and the value of a particular piece of music to a particular program.

The costs to television stations of the producers' present failure to engage in such bargaining are enormous -- and are increasing alarmingly every year. Payments under local television stations' blanket licenses have increased by an average of 11 percent per year over the past 15 years, to the point where, as noted, in 1986, ASCAP and BMI stand to receive as much as \$100 million or more from local television broadcasters for the essentially theme and background music involved. Half of that sum is earmarked for music publishers and, as noted, all but a small portion of that \$50 million will go to unproductive "music publisher" affiliates of the producer-syndicators.⁹

⁹ That local broadcaster payments as a percentage of their revenues have been dropping somewhat over the years hardly serves as justification for continuation of the current license system. The fact remains that absolute dollar payments have skyrocketed, and bear no relation whatsoever to the market value of the music.

Second, a source licensing system will reward composers in accordance with the value and distinction of their works, and open up new opportunities for promising composers. There is today little incentive for a producer who is not faced with the need to consider the worth of music to his production -- or to pay the fair value of such music as he selects -- to devise compensation levels or techniques designed to reward composers based upon the true value of their works. Thus, a truly well-established composer who creates an important musical score under the current system receives performing royalties based upon standardized distribution formulae devised by ASCAP and BMI which may not adequately recognize the unique talents of that composer.

On the other hand, where the music requirements of a particular program are modest and where one would expect that less established composers would be eager to compete on price for an opportunity to compose music, there is today little or no market for such enterprising composer. This argument was made by Solicitor General Wade McCree before the United States Supreme Court in connection with recent ASCAP litigation.

The fact that the present system favors a few, elite composers is borne out by the statistics. Currently, very few ASCAP and BMI composer members actually benefit from the ASCAP and BMI television blanket license. In fact, the distribution statements of ASCAP and BMI show that fully 85 percent of the composers and 86 percent of the publishers belonging to those organizations receive no distributions at all for performances of their music on television.

Third, under a source-licensing system, opportunities for composers to market their works to local broadcasters in connection with locally-produced programming will open up. Under the present system, local broadcasters pay the same blanket

license fee to the licensing societies irrespective of any music performing rights they may have directly acquired. While a local broadcaster thus may desire to engage composers in its community to provide customized music for locally-produced programs and pay those composers directly for the value of their music performing rights, no rational broadcaster would do so under the current blanket license system. It makes far more sense economically for the broadcaster simply to grab for a record or tape found in the station's library. To do otherwise would cause the broadcaster to pay twice for the same rights -- once to the composer and once to the performing rights society.

Composers from the 50 states who now lack a market to sell music performing rights because the stations are locked into their blanket license payments are certain as a result of this legislation to find a significant community of buyers ready, willing and able to purchase music rights and music packages, using local composers, and to pay fair market value for such music.

Fourth, the current system invites needless government regulation. Unable to achieve a competitive marketplace in which to fulfill their music requirements, the television broadcasters have been forced to commence a costly "ratemaking" proceeding under ASCAP's government consent decree. Ironically, the function of this proceeding is to approximate what an actual marketplace for such rights would yield! Perhaps there is a role, in some contexts, for such a ratemaking proceeding -- for example -- where no market alternative can function and where, therefore, the blanket license is necessary to permit composers to be paid for the use of their music. But such judicial machinery is neither necessary nor appropriate where, as here, a free market alternative exists and provably works.

The subcommittee is fully aware of the difficulties of

ratemaking by the Copyright Royalty Tribunal. The consent decree rate court has had an even more difficult time setting rates -- in its more than 35 years of existence, no rate proceeding has been litigated to its conclusion.

As to the doomsday predictions concerning a source licensing market, the short answer is "nonsense." There are market models in place and functioning, and functioning well, which confirm the feasibility of a source licensing market. The motion picture theatre model is one such example. Motion picture theatre exhibitors -- who stand in precisely the same position vis-a-vis theatrical film distributors as local television station owners stand in relation to syndicated programming distributors -- for nearly 40 years have benefited from the competitive licensing of music performing rights in the films they purchase. ASCAP, BMI and SESAC play no role in the licensing of music performing rights in connection with motion pictures exhibited in theatres. Instead, the producers (indeed, many of the very same producers who have perpetuated the blanket license system in television) bargain for these rights with composers and music publishers at the time of creation of the films and pass these rights along to the exhibitors a part of the licensing package.

Most of the motion pictures sold in syndication (which account for approximately 25 percent of all syndicated programming) are previous theatrical releases. It is indeed ironic that the very same music in the very same film is licensed differently when it appears at the uptown theatre on Connecticut Avenue (licensed by the producer, at the source) than when it appears, two years later, on local television screens (licensed by the societies, as a tax on station revenues).¹⁰

¹⁰ This dichotomous treatment is in fact the result of historical accident. In negotiations between ASCAP and Department of Justice representatives subsequent to the 1948

Moreover, even the opponents of the legislation have had to concede, albeit prior to introduction of this legislation, that a source licensing system in television would work "like well-oiled machinery." As ASCAP's chief spokesman for over 30 years himself put it: "[I]f the need arose, the machinery to do it [source licensing] would be in place very quickly."

Similarly, when questioned as to the feasibility of a source licensing system in television, ASCAP's own economist unequivocally asserted that "[T]here's basically no reason why that couldn't be done. Certainly the mechanism is there on the background and theme music. It would be perfectly possible to work out some kind of arrangement that would cover not just the use of the initial music, but the performance royalties as well."

In this connection, it is important to note that the legislation does not mandate a "one-time payment" system; it, in fact does not prescribe or impose any particular method of compensation for the licensing of performing rights, instead leaving such determinations to the marketplace. And while the acquisition of rights on a "buyout" basis -- either total, without time limitation, as in the case of theatrical motion pictures, or for a limited number of years, with options for further periods, as in the case of synchronization rights in

Alden-Rochelle court ruling declaring the imposition of blanket licenses on theatre exhibitors to be unlawful, Alden-Rochelle, Inc. v. ASCAP, 80 F.Supp. 888 (S.D.N.Y. 1948), the staff of the Department quickly realized that the same licensing principles which warranted producer source licensing of music performing rights for theatrical exhibitions should also be applied to exhibitions of filmed product on television.

It was only ASCAP's argumentation that: (1) the television industry was in its infancy and was still developing; (2) television was, as of 1950, essentially a live medium and, therefore, was more analogous to radio than motion pictures; and (3) as of 1950, very few motion pictures and other films were broadcast on television, that persuaded the Government not to mandate source licensing for pre-recorded television product as well.

ASCAP has thereafter stonewalled providing analogous treatment to the local television broadcasters, even though the factors it cited and relied on in 1950 no longer pertain.

pre-existing music -- is not precluded, it is at least as likely that composers would bargain for, and receive, residuals dependent upon the level of commercial success of the programming. Such a residuals payment system would seem to offer advantages for both composers and producers. Composers would understandably want the opportunity to share in a program's success in the event it becomes a hit in syndication; producers would logically prefer to share the risk that the program may be unsuccessful by paying the composer a small amount up-front, and deferring additional compensation until the program's success is assured.

Of course, this very approach to compensation -- keyed to the syndication success of the program -- has been utilized to compensate writers, actors, directors, musicians, and other major contributors to programming. Indeed, the payment of residuals to composers would simply require minor modifications to existing computer programs administered by sophisticated companies already employed by the producer-syndicators -- which effortlessly keep track of residuals data for writers, actors, directors and others. In fact, such a residuals system would be considerably cheaper and involve far lower transaction costs than the present system in which "administrative expenses" of the licensing societies amount to some 20 percent of all licensing receipts.

CONCLUSION

The fundamental function to be served by the copyright laws is to balance fairly the needs of creators and users. The ASCAP/BMI/SESAC blanket license system has severely disadvantaged both television station users and a multitude of copyright owners foreclosed from the benefits of a free market for the purchase of music performing rights. In this market setting, the copyright laws have been misused as a monopolistic preserve for the benefit

of entities which serve no productive function in our copyright system. The Congress clearly did not contemplate that our copyright laws would engender such a result. Legislative reform is urgently needed to restore respect for our copyright system and an appropriate balancing of the interests of creators, users and the public alike.

RESPONSES OF PRESTON PADDEN
TO QUESTIONS SUBMITTED BY SENATOR MATHIAS

QUESTION

1. In your statement you say "within the king's ransom we pay for our programs, the necessary dollars can be found to cover the music that is incidental to those programs." Is it then your position that you should receive the public performance right to the music in those programs at no added cost? -- Is this right worthless?

ANSWER

No. It is not our position that the public performance right in music is worthless or that its inclusion in the total package of rights licensed should not result in an added cost.

It is our position that the value of music performance rights should be the subject of direct bargaining between individual sellers and buyers, rather than being determined by an arbitrary blanket license system which assigns the same value to all pieces of music enjoying copyright protection.

My reference to the "king's ransom" already paid for the rights to syndicated shows was to demonstrate that Hollywood studios are quite capable of taking care of themselves in a free and open market characterized by face-to-face negotiations. There is no reason to believe that they will not be able to bargain effectively for music performance rights just as they currently bargain for all other rights.

QUESTION

2. You say you would like to pay composers the same way that you compensate writers, directors, producers, electricians, animators, stagehands, and others. Of course, members of these other crafts are allowed under the labor laws to unionize and seek contractual protections to make sure they receive compensation for repeat performance of their work.

Composers, however, are not permitted to unionize, cannot bargain collectively, cannot negotiate industry-wide contracts. Is it fair to put all these people on the same footing?

ANSWER

It is true that under decisions as recent as last year, the efforts of composers and lyricists to form collective bargaining entities has been rejected by the NLRB.

Interestingly, these efforts have been resisted by the Alliance of Motion Picture and Television Producers, an arm of the MPAA. The producers argued successfully to the NLRB that composers were not employees, but were individual contractors. Thus, they were not entitled to bargain collectively under the labor laws. For purposes of copyright law, however, the Hollywood producers take an entirely different and inconsistent stand. They require composers of the music in syndicated programs to sign works-made-for-hire agreements in which the composers are considered employees for purposes of section 101 of the copyright law (Title 17, United States Code). This automatically grants to the studio irrevocable rights of ownership in the copyrights of all works created by these composers. Under these works-for-hire agreements the studios are in a position to dictate how and when each musical work will be commercially exploited and they are entitled to reap the rewards.

It is with the full powers of copyright ownership that the studios currently make the determination to license through ASCAP and BMI. It is only with the studios' permission that the system permitting the composer currently to receive continuing royalties exists.

The reason studios agree to let composers share in music license revenue is that it makes economic sense. By compensating composers out of revenue generated only after a show goes into

syndication, long after the original production, they are able to obtain the services of composers and lyricists for very low capital investments up-front. When license revenue flows in later they can compensate for the services of these creators with little or no financial risk to themselves.

This fundamental economic principle will not change with enactment of S.1980. Studios will still have every incentive to back load payments to composers. The only difference is that they will pay them residuals based on the syndication revenues (which will include payments for music performance rights) that they receive directly from stations. This is the same way all other creators (actors, directors, scriptwriters) are paid.

While it is true that these other creators are currently unionized, their guilds negotiate for minimum terms and conditions. The fundamental principle of residuals is not the basic issue in these negotiations.

To the extent that it would be advisable to permit composers, under the system created by S.1980, to be able to bargain collectively for minimum residuals, we broadcasters would have no objection and we would work with the Committee on appropriate amendments.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
BUFFALO BROADCASTING COMPANY, INC., :
et al., :

Plaintiffs, :

-against- : 78 Civ. 5670 (LPG)

AMERICAN SOCIETY OF COMPOSERS, : NOTICE OF PETITION BY
AUTHORS AND PUBLISHERS, et al., : STORER COMMUNICATIONS,
and BROADCAST MUSIC, INC., et al. : INC. FOR RELIEF UNDER
JUDGMENT ¶ VIII(F)

Defendants. :
-----x

PLEASE TAKE NOTICE that, upon the annexed affidavits of R. Bruce Rich and Henry J. Davis sworn to on April 27, 1984 and the exhibits annexed thereto, and upon the prior proceedings had herein including the Judgment and Permanent Injunction entered on January 4, 1983, as modified by Order dated January 12, 1984 ("the Judgment"), petitioner STORER COMMUNICATIONS, INC., formerly known as Storer Broadcasting Company ("STORER"), on behalf of the seven local television stations owned by STORER, will petition this Court on the 16th day of May, 1984, at the United States Courthouse, Foley Square, New York, New York, at 9:30 a.m. or as soon thereafter as counsel may be heard, for an Order, pursuant to paragraph VIII(F) of the Judgment, granting STORER's seven local television stations a reduction in the amount of their interim license fees due defendants American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") (under paragraph VIII(D) of the Judgment), effective with each station's April 1984 payments to ASCAP and BMI, in the amounts set forth below:

<u>Station</u>	<u>Percentage Reduction Sought</u>
KCST (San Diego)	53%
WTVG (Toledo)	50%
WJKW (Cleveland)	47%
WJBK (Detroit)	42%
WSBK (Boston)	40%
WITI (Milwaukee)	38%
WAGA (Atlanta)	32%

Dated: New York, New York
April 27, 1984

Yours, etc.

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Sheldon Harnick, et al.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	
BUFFALO BROADCASTING COMPANY, INC.,	:
et al.,	:
Plaintiffs,	:
-against-	:
	: 78 Civ. 5670 (LPG)
AMERICAN SOCIETY OF COMPOSERS,	:
AUTHORS AND PUBLISHERS, et al.,	:
and BROADCAST MUSIC, INC., et al.	:
	: <u>AFFIDAVIT IN SUPPORT</u>
	: <u>OF PETITION OF STORER</u>
	: <u>COMMUNICATIONS, INC.</u>
Defendants.	:
-----X	
STATE OF NEW YORK)	
: ss.:	
COUNTY OF NEW YORK)	

R. Bruce Rich, being duly sworn, deposes and says:

1. I am a member of the firm of Weil, Gotshal & Manges, attorneys for the plaintiff class herein and petitioner STORER COMMUNICATIONS, INC., formerly known as Storer Broadcasting Company ("STORER"). I submit this affidavit in support of STORER's petition, on behalf of the seven local television stations which it owns, for an Order under paragraph VIII(F) of the Judgment and Permanent Injunction entered herein on January 4, 1983, as modified by Order dated January 12, 1984 (the "Judgment," a copy of which is annexed hereto as Exhibit "A"), granting each of STORER's stations a reduction in the amount of interim license fees due to defendants American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"), effective with each station's April 1984 payments to ASCAP and BMI.

2. The purpose of this Affidavit is to set forth the legal framework for STORER's Petition and to summarize the factual grounds supporting the Petition. The supporting facts and data are set forth in detail in the accompanying affidavit of Henry J. Davis, Vice President of Program Development for STORER.

3. As the Court will recall, after the Court's trial decision dated August 19, 1982, the parties contested the appropriate form of Judgment herein. Among other matters contested at that time was the appropriate form of the interim blanket licenses which the Court determined should be

continued, at defendants' request, until the effective date of the Judgment (originally February 1, 1984, now November 1, 1984). Specifically, plaintiffs argued that in order for local television stations, producers or syndicators to have any incentive at all during this interim period to move toward the competitive licensing system envisioned by the Court's trial decision, it was necessary to provide in the Judgment for some form of "carve-out" relief, which would permit a station to receive a reduction from its interim blanket license fees based on its ability to obtain music performing rights independent of ASCAP and BMI (i.e., "at the source"). See Transcript of hearing dated December 10, 1982 (a copy of which is annexed hereto as Exhibit "B") at 29-31, 34-36 and 48-50; and Transcript of hearing dated December 13, 1982 (a copy of which is annexed hereto as Exhibit "C") at 13-17.

4. Defendants' objections notwithstanding, the Court in its December 15, 1982 memorandum decision concerning relief issues (a copy of which is annexed hereto as Exhibit "D"), ruled in plaintiffs' favor on this issue, holding that it "... would permit plaintiffs, at any time after the judgment is entered, to apply for a prospective reduction in the amount of the interim license fees based upon a showing that local television stations have obtained performing rights licenses from parties other than ASCAP and BMI." Mem. Op. at 3. That ruling was incorporated in the final Judgment, as ¶ VIII(F), as follows:

At any time after this judgment is entered, the plaintiff class or any local television station owned by a plaintiff class member may apply to this Court for a prospective reduction in the amount of the interim blanket license fees based upon a showing that such local station(s) have obtained performing rights licenses from parties other than ASCAP and BMI.

5. The instant STORER petition and supporting affidavit of STORER's Henry J. Davis demonstrate in no uncertain terms the appropriateness of relief under ¶ VIII(F) of the Judgment herein. Given the impetus of the Judgment, a

variety of new music sources for local programming, offering local television stations all rights in the music licensed, including performing rights, have developed. In conjunction with these sources, STORER's local television stations have created the machinery which has enabled them to clear "at the source" the music contained in almost all of their locally-produced programs. At this point, the stations have succeeded in doing so largely through the vehicle of contracting with local music package services or music libraries. Given more time, STORER expects that machinery can be developed to clear the remaining portion of the STORER stations' local programming at the source. See Davis Aff. ¶¶ 7, 13-14.

7. Prior to the Judgment -- and the "carve-out" opportunity provided by ¶ VIII(F) therein -- no such market of "cleared at source" music sources existed. This is not surprising since the all-or-nothing, double-payment provisions of the blanket license provided no incentive for STORER or any other local television station to attempt to clear such local music usage at the source. All that such efforts would have accomplished would have been to cause the stations to incur additional expenses for music with no corresponding benefit.

8. Notwithstanding STORER's progress in clearing locally-produced programs at the source, its stations remain compelled to take a blanket license to cover the vast majority of their non-network program day, syndicated programming, for which -- as the trial herein demonstrated and the Court found -- they are powerless to effectuate a change to source licensing absent court order.

9. STORER's data demonstrates a solid, unimpeachable methodology for computing the amount of the appropriate reduction for each of STORER's stations. Specifically, consistent with the methodology for determining the amount ordinarily due under the blanket license itself, i.e., a specified percentage of the station's non-network

revenues (subject to certain deductions), the reduction requested by STORER's petition (for each of its stations) is based on the percentage of the station's non-network revenues attributable to programs entirely cleared at source, that is, which can be broadcast by the stations independent of any ASCAP or BMI license -- whether because music rights have been fully cleared or because no copyrighted music at all is being used.

10. The STORER data unambiguously establishes not only the extent to which the STORER stations have been able to accomplish such independence from ASCAP and BMI for their local programs in March, but also establishes the minimum extent to which local programs on the STORER stations will be source-cleared prospectively. See Davis Aff. ¶¶ 6-7, 12-14. That is because the subject matter content of local programming remains relatively constant (dominated by news, sports, public affairs programs and local documentaries), and because the arrangements which already have been made for source clearance of music in such programs cover extended time periods -- they are not one-shot deals which expired in March. Id. If anything, the percentage of source-cleared programs will increase as source licensing machinery is developed to deal with the remaining portion of the stations' local programming. Further, to assure defendants that there will be no change from STORER's now-established practice of source licensing of locally-produced programs, the STORER stations are prepared to retain tapes of their local programming for at least six months so that ASCAP and BMI representatives may verify the accuracy of STORER's figures and the propriety of the requested reduction. See Davis Aff. ¶ 15.

11. In sum, the source-clearing accomplishments of the STORER stations represent precisely the type of development which was contemplated by the ¶ VIII(F) proviso in the Judgment. The pre-Judgment hearing arguments reflect that the reasoning behind this provision was to give stations the

incentive to explore marketplace alternatives to ASCAP and BMI and to reward such efforts by providing the stations with an opportunity to obtain a reduction in their interim licensing fees were they to succeed. Storer's success to date is more than amply demonstrated by the unequivocal supporting data and affidavit of Mr. Davis.

12. Accordingly, based on all the foregoing, we respectfully request the Court to issue an order granting the STORER stations the prospective fee reductions set forth below, effective with each station's monthly payments to ASCAP and BMI beginning with April 1984:

<u>Station</u>	<u>Percentage Reduction</u>
KCST (San Diego)	53%
WTVG (Toledo)	50%
WJKW (Cleveland)	47%
WJBK (Detroit)	42%
WSBK (Boston)	40%
WITI (Milwaukee)	38%
WAGA (Atlanta)	32%

The stations also specifically reserve their right to supplement this Petition and seek a further prospective fee reduction at a future date.

R. Bruce Rich
R. BRUCE RICH

Sworn to before me this
27th day of April, 1984

Kenneth L. Steintal
Notary Public

KENNETH L. STEINTAL
NOTARY PUBLIC, State of New York
No. 62-4772704
Qualified in Westchester County
Commission Expires March 30, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	
BUFFALO BROADCASTING COMPANY, INC.,	:
et al.,	:
Plaintiffs,	:
-against-	:
	: 78 Civ. 5670 (LPG)
AMERICAN SOCIETY OF COMPOSERS,	:
AUTHORS AND PUBLISHERS, et al.,	:
and BROADCAST MUSIC, INC., et al.	:
	: <u>AFFIDAVIT IN SUPPORT</u>
	: <u>OF PETITION OF STORER</u>
	: <u>COMMUNICATIONS, INC.</u>
Defendants.	:
-----X	

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

Henry J. Davis, being duly sworn, deposes and says:

I. I am Vice-President of Program Development for STORER COMMUNICATIONS, INC. ("STORER"). I submit this affidavit in support of STORER's petition, on behalf of the seven local television stations which it owns, for an Order under paragraph VIII(F) of the Judgment and Permanent Injunction entered herein on January 4, 1983, as modified by Order dated January 12, 1984 (the "Judgment," a copy of which is annexed to the accompanying affidavit of R. Bruce Rich in support of STORER's Petition), granting each of STORER's stations a reduction in the amount of interim license fees due to defendants American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI"), effective with each station's April 1984 payments to ASCAP and BMI.

2. After entry of the Court's Judgment in 1983, in an effort to reduce the STORER stations' significant music license fees due to ASCAP and BMI under the interim blanket licenses (which, because of the stations' inability to otherwise obtain music rights for their syndicated programming, the stations had no alternative but to accept), the STORER stations began to to explore whether, and to what extent, they could obtain music performing rights licenses for their locally-produced programming at the source. Prior to that time, such efforts made little sense, since: (1)

under the blanket license, any costs incurred by a station to clear music at the source would have resulted in double-payment by the station for music; and (ii) as a result, there was no existing market of background music suppliers prepared to license music performing rights for stations' local programming.

3. Paragraph VIII(F) of the Judgment (quoted in ¶ 4 of Mr. Rich's affidavit), however, changed these circumstances by giving local television stations an opportunity to lower their ASCAP/BMI license fees "based upon a showing that [they] have obtained performing rights licenses from parties other than ASCAP and BMI." The Judgment thus provided us with an incentive to go forward in seeking to obtain music licenses and clearances for our locally-produced programming independent of ASCAP and BMI, at the source. And, since the Storer stations' local programming represents a significant proportion of their non-network revenues, we believed that a correspondingly significant reduction in ASCAP/BMI license fees could be achieved under ¶ VIII(F) were we to successfully limit our use of ASCAP/BMI music in our local programming; after all, this percentage-of-revenue concept is the very guidepost against which the ASCAP/BMI blanket license fees have (however inappropriately) been measured in the past.

4. Thus, during the past several months, STORER undertook to establish the appropriate machinery to accomplish source licensing of its locally-produced programs. As the producers of such programs, of course, the STORER stations are in a position to select the music to be used in their programs and are able to negotiate over the price to be paid for such music -- in sharp contrast to the stations' position vis-a-vis music in syndicated programming. The results of our source licensing efforts to date are summarized below, after which I will describe the supporting data and exhibits annexed hereto.

5. The lion's share of locally-produced programs for all seven of STORER's stations consists of news, sports, public affairs programs and local documentaries. In the past, because of the double-payment provisions of the blanket licenses, the stations largely had relied upon ASCAP/BMI music for the predominantly theme and background purposes for which music is employed on those programs. However, given the opportunity provided by § VIII(F) of the Judgment to substitute competitively-priced music in place of the corresponding ASCAP/BMI music for our local programming, our stations sought alternative avenues for securing music performing rights for these programs. What they found was an ever-increasing supply of music libraries or music package services which have been willing to convey all music rights -- including both synchronization and performing rights -- to the stations at the source, both for pre-existing music and music which they compose specifically for the stations (as is customarily the case with respect to station news themes and promotional announcements). Moreover, because in this situation the stations are in a position to negotiate directly with the music copyright proprietors prior to production, we have been able to obtain source-licensed music at a cost far below the corresponding percentage-of-revenue fees extracted by the blanket license.

6. Significantly, by March 1984, as the data annexed as Exhibits A through G demonstrates, the STORER stations succeeded in obtaining source-cleared music for the entirety of almost all their news, sports, public affairs programs and local documentaries for which music licenses were required (or succeeded in eliminating in its entirety unnecessary copyrighted music which may previously have been contained therein). The remaining local programs containing music of any kind consisted of various religious programs and a few other isolated programs (some of which were produced last year or earlier, prior to commencement of STORER's source licensing efforts). The magnitude of the Storer

stations' accomplishments is reflected by the fact that over 85% of the STORER stations' aggregate local programming revenues during the last four weeks of March derived from programs for which the stations have successfully avoided any need to license through ASCAP or BMI.

7. Moreover, we are currently exploring appropriate machinery to enable even the minority of non-source cleared locally-produced programs to be cleared independently of ASCAP and BMI. For example, we have made strides since the latter months of 1983 in seeing to it that source-cleared (or public domain) music be used in religious programming broadcast by the STORER stations; and we are confident that arrangements can be made for such programs in the future. As for the few public affairs shows and newscasts that aired in March which contained ASCAP/BMI music, we expect that source-cleared music can feasibly be substituted in the future with little difficulty.

8. The supporting data from each of the seven STORER stations demonstrating the extent of their licensing at source accomplishments (and thus the appropriateness of the fee reductions requested by this Petition) is annexed hereto as Exhibits "A" through "G".* The data sets forth, for each of the STORER stations during the last four full weeks of March 1984, a complete listing of:

- a. each non-network program broadcast by the station (identifying as well whether it is locally-produced or syndicated);
- b. the length of each program (in minutes/seconds);
- c. the amount (in minutes/seconds) of ASCAP/BMI music used in each locally-produced program;

* The exhibits and corresponding data are arranged as follows: Exhibit A - KCST (San Diego); Exhibit B - WTVG (Toledo); Exhibit C - WJKW (Cleveland); Exhibit D - WJBR (Detroit); Exhibit E - WSBK (Boston); Exhibit F - WITI (Milwaukee); and Exhibit G - WAGA (Atlanta).

- d. the amount (in minutes/seconds) of cleared-at-source music (or other music for which the station does not require an ASCAP or BMI license -- e.g., public domain), with an identification of the source (or basis) of the music performing rights (e.g., name of music packager);
- e. the amount (in minutes/seconds) of any other music contained in each program;
- f. the amount of revenue derived from each program;
- g. the total amount of revenue derived from locally-produced programs; and
- h. the total amount of revenue derived from non-network (i.e., locally-produced and syndicated) programming.

9. These exhibits reflect the results of a detailed process undertaken by all seven STORER stations under my supervision, which entailed not only the review of each STORER station's daily non-network programming and revenues, but also the monitoring of program tapes of each locally-produced program to determine the duration and source of all music contained therein.

10. The cover page of each of Exhibits A through G contains a summary of the data for the particular station involved. Line (C) of each summary sheet indicates the total revenues derived by each station from local programs for which it has fully source-cleared the music (or eliminated copyrighted music entirely). Line (E) of the summary sheet sets forth the all-important proportion (on a percentage basis) of the station's total non-network revenues which is derived from these independently-cleared programs; this

figure is computed by determining the ratio of:

$$\frac{\text{revenues derived from independently cleared programs}}{\text{revenues derived from all non-network programs}}$$

That percentage figure for the month of March for each STORER station is set forth below:

<u>Station</u>	<u>Percentage of Non-Network Program Revenues Attribut- able to Programs Cleared Independent of ASCAP/BMI</u>
KCST (San Diego)	53%
WTVG (Toledo)	50%
WJKW (Cleveland)	47%
WJBK (Detroit)	42%
WSBK (Boston)	40%
WITI (Milwaukee)	38%
WAGA (Atlanta)	32%

11. The percentage figures set forth in ¶ 10 above are indeed appropriate for determining the amount of the reduction to which each STORER station is entitled under ¶ VIII(F). The local station blanket license fee is set by computing a designated percentage of each station's non-network revenues. It is thus perfectly consistent with the license format itself to determine the appropriate "carve-out" reduction by computing the percentage of that same non-network revenue figure which is attributable to programs which the station is able to clear at the source, independent of any need for an ASCAP or BMI license. Indeed, such a methodology for determining the appropriate percentage reduction is not only totally consistent with the methodology of the blanket license, but it also follows this Court's directive, in ¶ VIII(F) of the Judgment, that the prospective reduction thereunder shall be "... based upon a showing that [the] local station(s) have obtained performing rights licenses from parties other than ASCAP and BMI."

12. Significantly, the March 1984 data comprising Exhibits A through G represents far more than one isolated month's results of source licensing efforts. The March data

represents the culmination of several months of effort, during which time the STORER stations have paid the full interim blanket license fees notwithstanding that they were paying as well to have an ever-increasing portion of their local programming source-cleared. Put another way, the March data represents the product of a gradual switch-over from ASCAP/BMI music to source-cleared music for the stations' locally-produced programming.

13. Moreover, the source licensing arrangements made to date -- which, as reflected by the supporting data attached hereto, have put STORER's stations as of last month in the position of having cleared almost all their local programming music needs at the source -- are ongoing. The arrangements which have been made with music libraries, local composers and music packagers to obtain the music which our stations now are using in their local programming are long-term, and will continue to provide the source for the stations' locally-produced music needs well into the future.

14. The March data thus provides a sound basis for determining a prospective rate reduction. The subject matter content of our stations' local programming remains relatively constant, dominated by news, sports, public affairs and local documentaries for which each station has made arrangements for source-cleared music covering not only March, but many months to come. Moreover, our source licensing efforts with respect to the few locally-produced programs not yet cleared at the source are continuing; and we have every expectation that even these programs will be source-cleared in the not-to-distant future. If anything, then, the March data establishes the minimum extent to which local programs on the

STORER stations will be source-cleared in the future.**

15. To assure ASCAP and BMI that there will be no slackening in the level of our source licensing commitments (or our corresponding entitlement to reductions under § VIII(F) as a result thereof), each STORER station is prepared to retain tapes of its programming for a period of at least six months and hold them available for review by ASCAP or BMI representatives, so that ASCAP and BMI will be able to verify the continuing basis for the fee reductions sought by this Petition for each station.

16. Of course, notwithstanding the STORER stations' demonstrated ability to obtain music rights for locally-produced programs at the source, they still have no present alternative to the interim blanket license for the vast majority of their non-network program d-v, i.e., syndicated programs. As this Court ruled in its trial decision, the STORER stations -- like all individual local television stations -- have no "realistic alternative" to the blanket license for obtaining music performing rights in their syndicated programs. 546 F. Supp. 274, 292-93 (S.D.N.Y. 1982).

17. Based on all the foregoing, we respectfully submit that STORER has made a more than requisite showing of the propriety of relief under § VIII(F) of the Judgment. Therefore, we respectfully request the Court to issue an order granting the STORER stations the prospective fee

** This is especially true in the case of WAGA-TV in Atlanta. WAGA had made arrangements with, inter alia, two background music suppliers with the understanding that WAGA was obtaining all necessary music rights for broadcast over WAGA, including music performing rights, without the need for any additional licenses. Earlier this month, these suppliers informed WAGA that there had been a misunderstanding and that music performing rights had not been conveyed to WAGA. The 32% reduction sought by WAGA herein is thus far lower than what can be expected once source-cleared arrangements are made either with these suppliers or with other music packagers. Indeed, but for this unexpected misunderstanding, WAGA would have been in a position to petition this Court for a 55% reduction; and WAGA intends to supplement this petition to seek a reduction of that magnitude once alternate arrangements have been concluded.

reductions set forth below, effective with each station's monthly payments to ASCAP and BMI beginning with April 1984.

<u>Station</u>	<u>Percentage Reduction</u>
KCST (San Diego)	53%
WTVG (Toledo)	50%
WJKW (Cleveland)	47%
WJBK (Detroit)	42%
WSBK (Boston)	40%
WITI (Milwaukee)	38%
WAGA (Atlanta)	32%

In addition, each Storer station specifically reserves the right to supplement this petition to demonstrate that, by virtue of further source licensing efforts, it should be entitled to an even greater prospective reduction.

Henry J. Davis
HENRY J. DAVIS

Sworn to before me this
27th day of April, 1984

/s/
Notary Public

April 25, 1986

The Honorable Charles McC. Mathias, Jr.
United States Senate
Chairman, Subcommittee on Patents,
Copyrights and Trademarks
Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Mathias:

I thank you for the opportunity to respond to written questions submitted to me by members of the subcommittee, concerning my testimony at the hearing on S. 1980 on April 9, 1986.

At your suggestion, the Association of Independent Television Stations has worked in cooperation with the All-Industry Music Licensing Committee and joins them in presenting consolidated answers to "Questions for Proponents from Senator Mathias" and from Senator DeConcini. Those answers are being sent to you by the All-Industry Committee under separate cover.

In addition, I would like to add that during a recent panel session at the National Association of Broadcasters (NAB) Convention in Dallas, Senator DeConcini expressed concern whether the broadcasters have made an adequate effort to negotiate with composers for individual programs. Had I been a member of that panel I would have responded that under the Works for Hire Doctrine, the studios are the owners of both the synchronization and performing rights in the music contained in their programs. Thus, each time a broadcaster sits down and negotiates with a studio distributor, the broadcaster is negotiating with the owner of the music rights in the program. Consequently, negotiations with the composer, who has already signed away his rights as a condition of employment, would be completely fruitless.

I turn now to the written questions submitted to me by you. The first question centers on whether broadcasters "should receive the public performance rights to the music in those programs at no added cost? -- Is this right worthless?"

No. It is not our position that the public performance right in music is worthless or that its inclusion in the total package of rights licensed should not result in an added cost. Anyone reviewing the 35 year history of syndicated program sales knows that the prices paid for programs in the syndication marketplace are set by supply and demand; the price bears almost no relationship to the cost of actually producing any given show.

If S. 1980 is enacted, it may turn out that the sums we are now paying (\$15 million for Magnum P.I.) are sufficient to cover the music performing rights, along with all the other rights in the program. It may turn out that for other programs, that the enactment of S. 1980 will lead to additional compensation for the distributor. The essential point is that the value of the music performing rights -- just like all of the other rights in the program -- would be set in the marketplace.

I am also pleased to respond to your second question, which centers on the inability of composers to unionize or bargain collectively or negotiate industry-wide contracts. You ask whether it is fair to put composers on the same footing with writers, directors, producers, electricians, animators, stagehands and others?

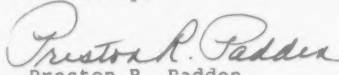
At present, the film studios have it both ways on the employment status of the composers. First, studio management (usually a producer) chooses the composer and treats him as an employee, for the purpose of the Works for Hire Doctrine. This enables the studio to claim, as a matter of law, that it is entitled to the creative effort of an employee and the copyright in the music belongs to the studio. However, when it comes to collective bargaining, the studios have taken the position that the composers are not employees and are therefore unable to bargain collectively. It would seem to us the composers are either employees or independent contractors, not both. As such, the Subcommittee might well consider an amendment to the bill that would make it possible for the composers to bargain collectively with the studios. I must point out, moreover, that the most successful composers, like the most successful writers, directors and animators, will likely negotiate contracts far above any union pay scale. In Hollywood, as you know, a pay "scale" is a floor, not a ceiling.

As a consequence, composers may be able to negotiate residual rights, just like other creative persons in the film and television business; but you will have freed the marketplace to work its magic. It is my conviction that the American people will be better served by a system that permits the marketplace to value the worth of any given musical composition. Under the present system, no qualitative factor is permitted in the distribution system. Different musical compositions are treated, essentially, as fungible items with no difference in value and, as a consequence good composers are under compensated while mediocre ones are over compensated. This robs composers of an important incentive. You have already heard from me at some length on a possible renaissance in local music writing and production that might well result from television stations being freed from the tyranny of blanket music licenses.

Finally, as a matter of pure logistics, permit me to note that already, the producer of any program does sit down with the composer and purchase the synchronization rights to the music. It is a simple matter to negotiate compensation for performance rights at the same sitting.

I would like to thank you and the other members of the Subcommittee for their kind attention and courtesy during the hearing and I continue to be ready to respond to any additional questions you may have.

Sincerely,


Preston R. Padden
President

Senator MATHIAS. Thank you, Mr. Padden.

Senator DeConcini.

Senator DECONCINI. Thank you, Mr. Chairman.

I have a number of questions and I see that time is running short so I will submit some of them.

Let me ask a general question. Is it not true that many of the arguments that are put forward here today in support of S. 1980 were presented to the Federal court and have been rejected, not on a legal basis, but on a factual one? Did not the circuit court find that broadcasters are not forced to accept blanket licensing? Did the court not find that there are viable alternatives to the blanket licensing system, including direct licensing, preprogram licensing, and source licensing? Did the circuit court not find that the blanket license fee was negotiated properly between the parties and that the fee was reasonable?

Now, if I am mistaken on my findings of the court, I would like to be corrected. If not, what is the problem?

Mr. ARRIES. Senator, let me try to answer part of it at least.

The court, the initial decision was in favor of the industry. It was reviewed at the court of appeals level and reversed. But they were looking at the blanket license in an antitrust context.

The court's decision did not really say all of that. What the court said was that the broadcasters did not for the court prove conclusively that we did not have alternatives.

Now, I think the best answer to your question is, if S. 1980 mandated—instead of mandating source licensing, mandated the end of blanket licensing, I think both sides would agree that what would come to happen is source licensing. Because that is the only logical way to set up a fair marketplace system for music licensing. And I believe that that is the best answer I can give you to your question.

Senator DECONCINI. Mr. Arries, did the circuit court find that the blanket licensing fee was negotiated properly between the parties and that the rate was reasonable? Was that a finding of that court?

Mr. ARRIES. I cannot really give you that answer, Senator. My belief is that they said that we did not prove conclusively that we did not have alternatives.

I can tell you I sat across the table from ASCAP and BMI, and there is no negotiation with them. We are subject totally to their largesse. They have their consent decree working for them. We have no bargaining power at all.

I sat across the table and bargained with the National After Union, with the agents for Mike Douglas and Merv Griffin. And I know what bargaining is. There is no bargaining with ASCAP and BMI.

Their newest demand, going after declining stairstep formula in case of ASCAP is to jump from 1.15 to 1.42. And we have no way to stop them from that except to go to the rate court.

Senator DECONCINI. I have to say that one of the things that disturbs me is the unfairness that your industry finds yourself in. I hate to be in a position of saying what is a good profit because you guys are making plenty of money. So that does not trouble me.

What does trouble me is that you do not have much of an alternative. If they say this is the price, you guys have got to pay it.

And ASCAP is like anybody else. They are as selfish as they can possibly be and you do not have an alternative.

Mr. ARRIES. That is true.

Senator DeCONCINI. Let me ask one other question and then I will submit the balance.

According to the analysis of the second circuit court S. 1980 would not result in opening the market but instead would close it down. That is how I understand that case said. If there are alternatives presently available to the license, if Congress passes a bill that mandates source licensing, are we not, in reality, destroying all but one of the presently available licensing systems?

Mr. ARRIES. As I said earlier, Senator, I believe that if S. 1980, instead of mandating source licensing, mandated the end of the blanket license, all sides would go to source licensing because that is the logical way to pay fairly for music.

Senator DeCONCINI. We really are going to mandate a different licensing, with only one kind available. We are going to end up with just source licensing.

Mr. ARRIES. That is correct. But a per program license as it now is constituted is not realistic. We are in the rate court to find out what realistic is.

But would not it may be much better to let the marketplace decide rather than have the judicial process decide?

Senator DeCONCINI. Last quick question.

What do you do about someone who has got a new program that is not a hit? They sell it to you for peanuts. Even you agree it is a good deal. You buy it for just a few hundred thousand dollars because you do not know if it is going to be any good. And then it becomes very, very popular.

The songwriter, under this legislation, would be left out because he would be included in that deal when it was sold very cheaply and would not have any way to recoup later.

The motion picture industry is big and powerful. They have got their negotiators. So they are in a little better position to judge that. Maybe that songwriter is not.

How do you respond to that?

Mr. ARRIES. There are two ways to respond to it. But, first and most importantly, I do not think the broadcasters should be saddled by a blanket license in order to protect composers from the Hollywood producers and syndicators.

Senator DeCONCINI. Well, I am not talking about that. That is passing the buck.

What about the fairness issue as to that songwriter?

Mr. ARRIES. Yes; I think that the songwriters are entitled to residuals, and I think that the language of this bill, we can work with the Senators to ensure that they are entitled to residuals for a pilot, for the network play, and for syndication.

We have no objection at all to adjusting to that

Senator DeCONCINI. You have no problems with some provision there for residual if a blanket—

Mr. ARRIES. Absolutely not on forced licensing.

You see, Senator, that is the situation. And what you will hear from Mike Post, they are scared of the Hollywood producers and what they might lever on them as far as getting paid fairly for

their music. Now, they do get paid fairly from those same Hollywood producers to theatrical release in their own minds. So, suddenly, why should that change for television?

But if there is that danger of happening, then I think the bill can add some language to ensure that they get paid properly.

Senator DeCONCINI. Thank you.

Thank you, Mr. Chairman. I have other questions I will submit.

Senator MATHIAS. Senator Hatch, do you have any questions?

Senator HATCH. Yes. It has been implied that quote splitting of synchronization and performance rights is somehow improper.

In this regard, I would like to just quote from a Seventh Circuit Court of Appeals opinion:

The right of an author on his intellectual property resembles any other personal property right. It may be sold outright in its entirety as a limited interest, maybe a sign. The various rights which compose a copyright may be split up and sold to different entities.

This suggests that the Copyright Act itself is the source of separate licensing for such performance—for both synchronization and performance rights. Would you call that a fair reading of the Copyright Law?

Mr. ARRIES. I think there are two rights that function, synch rights and performance rights, and when a Hollywood producer sits down with a composer for a movie that may play both theatrical and television, he negotiates synch rights and performance rights for theatrical release, and only synch rights for television release.

Senator, it does not make sense. The performance rights should be negotiated for television at the same time and could very logically be.

Senator HATCH. Proponents of the legislation keep telling us that source licensing is not available in the marketplace. But is it not true that, prior to the commencement of the Buffalo broadcasting litigation, no local broadcaster had ever attempted to source license music performance rights from a producer or a syndicator.

Mr. ARRIES. Well, we tried at the time of that case, both somewhat before and after—

Senator HATCH. I am talking about prior to the commencement of that case. Nobody had ever done that.

Mr. FRITTS. Yes, they have, Senator. I think Storer Broadcasting attempted to do that, and you will hear testimony from one of the other panels.

Senator HATCH. Can you give us some information on that?

Mr. FRITTS. Yes, we will.

Senator HATCH. That will help.

Mr. PADDEN. Senator, if I could jump in.

As I said in my testimony, so long as we are stuck with a blanket license for some of our programs, and we are going to have to pay that blanket license, under the present system there is no incentive in the real world for a broadcaster to offer to pay more to source license a particular program that is not going to reduce his liability under the blanket license. It is like going to the table and ask for permission to pay more overall for your music.

So, unless and until the Congress does something to break the vicious cycle of the blanket license, I think it is totally unrealistic to talk about any alternatives.

Senator HATCH. Thank you.

That is all I have, Mr. Chairman.

Senator MATHIAS. Senator Kennedy.

Senator KENNEDY. First, Mr. Arries, we are talking here only about syndicated programs, is that right?

Mr. ARRIES. That is correct.

Senator KENNEDY. And do you support any blanket licensing for other kinds of programs such as the news programs, the weather, or other types of local programs?

Mr. ARRIES. It is possible, Senator, that some local television stations for local production only might want some kind of a blanket license. We are talking about syndicated and the need for source licensing in syndicated programming.

Senator KENNEDY. But you draw a different conclusion in regards to news and weather and other kinds of programming other than the syndicated?

Mr. ARRIES. What I believe will really happen, Senator, if there was no blanket licenses, that the television stations in America would begin to look to the composers in their marketplace to produce music for the openings and closings and bridges on their news programs and their public affairs and their local movie programs, the openings. So that I think, in effect, many more composers across America would benefit from the end of the blanket license.

Right now today, the basic composers that benefit from the current system are located in New York, Hollywood, and Nashville. That is why Senator Gore testified.

The broad base of composers, as we have pointed out in our statistics, 85 percent of all composers from BMI and ASCAP receive not 1 cent from the copyright.

Senator KENNEDY. Have you tried to negotiate for a carve-out?

Mr. ARRIES. We have tried negotiation for carve-outs. But again, as long as the blanket license is there, it is difficult. We could try to get a carve-out, but it is difficult as long as the per program requires us, in essence, to pay for the full library, the 4 million plus titles that these two major societies hold.

If there were a carve-out where we could buy just—pay for just the music in that particular program against the revenue in that program, there would be some advantages to that perhaps.

Senator KENNEDY. That is not a carve-out. That is a program license.

Mr. ARRIES. Well, that is true. But that revenue then could be—in that program carved out from the gross revenues on which we pay the blanket license.

Senator KENNEDY. Well, could you supply for the committee what efforts have been made in terms of carve-outs? What efforts have been made by the broadcasters?

Mr. ARRIES. I would be glad to do that, Senator.

Senator KENNEDY. Just in response to a question that you answered for Senator DeConcini about sitting opposite ASCAP and their naming their figures, and you made a comment about whether this is really negotiating or collective bargaining, so to speak.

Once that figure is established, if you feel that it is unwarranted or unjustified, can you not take them to court?

Mr. ARRIES. We can take ASCAP to the rate court. We do have that privilege with BMI.

Senator KENNEDY. Well, have you taken ASCAP to the rate court?

Mr. ARRIES. We are in the rate court there, Senator. And for the first time, somebody is going—a magistrate is going to have to decide in kind of an artificial atmosphere what music is worth. And I think I have to say to you that look at the Copyright Tribunal and the trouble they have had with setting up the rates in distribution of copyright, Hollywood and sports and to local stations, and you can see that the dangers that exist in going to the rate court.

The source licensing gives the marketplace the play, and the marketplace will determine the value of music. And that is the healthiest way to go

May I just say historically, Senator, it is nice to see you again. I was present when you made your first political speech and your first debate.

Senator KENNEDY. Is that right? Were you really? [Laughter.]

But I look at this a lot differently now. [Laughter.]

This legislation represents a major alteration in the way we are going to do business in this area and certainly raises a number of significant issues. What do you feel is the compelling public interest justifying this change?

Mr. ARRIES. I believe that the public will have the benefit—

Senator KENNEDY. If I could hear from each of them briefly.

Mr. ARRIES. I believe that the public will have the benefit of hearing from a lot more composers. And I certainly do not believe, as I witnessed a press conference this morning, that suddenly music in America will dry up. Because, obviously, all of the composers in America want to produce music, they make records, they make a lot of money off records, they will produce music for movies, and the movies will compensate them properly. And so America is not going to lose, as a result of the passage of this bill, great music.

We will still get that. But this will open the door to a lot of young composers in markets that are not in New York, L.A. and Nashville to have their product used on television.

Senator KENNEDY. Can I hear from the others?

Mr. FRITTS. Yes, Senator, I would agree with Mr. Arries on that point, that the primary benefit would be the opportunity for additional composers to have their works of arts displayed on television.

With regard to what Senator Gore said earlier today, relative to traveling in foreign countries, I think his analogy was more appropriate for radio than for television because syndicated television is sold as a self-contained package as opposed to the various songs in other countries.

Mr. PADDEN. Under the present system, there is no qualitative element in the distribution of these moneys to composers. So the theme music we saw in the "Peoples Court" earns the same amount of money per number of plays as a truly great musical composition.

Senator MATHIAS. Under source licensing, the composer of that theme probably thinks it is a true greater musical composition. [Laughter.]

Mr. PADDEN. Under source licensing, the marketplace would permit a piece of music to earn its way in the marketplace and be compensated based on its value. And I think the American public would benefit from having a system where there was a qualitative element in the compensation to composers.

Senator KENNEDY. Well, I suppose the composer would say, if you get a repeat number of playings of that, that they would get additional resources though. Would the composer say that?

Mr. PADDEN. Well, I think they would, and I think they should.

And I would like to respond to this point. I understand earlier today at a press conference, the argument was made that if this bill passes, composers will only get paid one time for their music and will not get any residuals.

Well, that is an issue between the composer and the producer that they create the music for. That does not really involve the station. And it seems to me that if there is a concern about the fairness with which Hollywood will negotiate with composers, it is not logical to address that concern by saddling the broadcasters with a blanket music license.

Mr. ARRIES. Senator, I might add just to that——

Senator MATHIAS. You can make it very brief because we are running very much over.

Senator KENNEDY. Let me go to my final question.

Of course, the Register of Copyrights reaches an entirely different conclusion in terms of compensation to the composer. How do you respond to that?

Mr. ARRIES. Basically what I was going to say, Senator, the same analogy could work for talent and for directors and scriptwriters. They get paid fairly for every play——

Senator KENNEDY. You can get arguments on that about the writers for plays in New York, who get the last payment if the show closes. It is not a good analogy I would think.

Mr. ARRIES. With all due respect, Senator, we are talking about television programs, and those programs——

Senator KENNEDY. We are talking about creative arts. We are talking about the artists. That is what many of us are interested in.

You indicate that you think that composers are going to be better compensated. The Register of Copyrights reaches an independent decision based upon his analysis that they will not.

What is the flaw in his reasoning?

Mr. ARRIES. I think you will hear some direct testimony from our next panel about that.

But what I am saying is that I think a broader base of composers will be compensated.

Senator MATHIAS. So that we can get to that next panel, I am asked by Senator Thurmond to propound to you one question. And I give it to you as he has proposed it.

If the opponents to S. 1980 assert that it would prevent users from receiving continued payments when a show becomes successful, is this true in your view?

Mr. ARRIES. It happens for talent, it happens for directors. As this show becomes successful, there are additional residuals paid in syndication. For each six plays of a television show, that triggers a new set of payments.

The same thing would happen for composers, or we can ensure that in the language of the bill.

Senator MATHIAS. Now, Senator Thurmond asked further, as a practical matter, under S. 1980, how and by whom would publishers and composers be compensated for their work?

Mr. PADDEN. I would like to reply to that if I could.

As I indicated, one station has paid—one single station has paid \$15 million for the reruns to "Magnum, P.I." Now, that suggests to me that there is enough money flowing from the station to the producer for this use of a successful work. How much of that \$15 million the studio passes on to the composer, it seems to me, is an issue that does not really involve the station.

Mr. ARRIES. And you cannot ignore the linkup between the producer and his music publishing arm. You are talking to the same corporate entity but different parts of it.

Senator MATHIAS. Now I have just one question on my own, and I am going to submit the rest of my questions in writing.

But one statement in your testimony touches me at a very tender point. Because you say that if the current system which, incidentally, has been in effect now for 40 years, you say if this system is permitted to continue, it is certain to breed widespread disrespect for our system of copyright protection.

Now I, personally, feel very strongly about intellectual property and its sanctity and its protection.

If you are right about this, why have we not seen any sign of this pernicious effect in the 40 years that the current system has been in play?

Mr. ARRIES. Well, we have been fighting this for almost all of those 40 years, Senator. We went back in 1961 to the rate court and fought a bitter battle there for almost 8 years. In 1978, we filed the antitrust.

We are saying that the copyright system, because as television has evolved from live music to all prerecorded and put on tape and film, the copyright system does not work. And the broadcasting industry, the television industry is coming to the Congress as a court of last resort for help.

Senator MATHIAS. But how does it hurt the copyright and how do you perceive that the status quo will hurt the copyright?

Mr. ARRIES. Well, I think it hurts copyright because, as I understand copyright, it is supposed to help both the copyright holder and the person who uses the copyright. And we, the people who used that music, are being hurt by it. We are paying unfairly for the value of the music.

Mr. PADDEN. Senator, if I could take a stab at that.

It was not my statement, but it seems to me that the current system can at least arguably be characterized as an abuse of the copyright privilege. And to the extent that that abuse is permitted to exist and continue, it seems to me that it has the potential to breed disrespect for the system.

Senator MATHIAS. Well, I regret that we cannot continue this dialog, but I will submit some questions to you in writing.

Senator HATCH. Mr. Chairman, I would like to submit some questions also.

[Following responses were subsequently submitted for the record:]

RESPONSES OF PROPONENTS TO QUESTIONS SUBMITTED BY
SENATOR DECONCINI

QUESTION

1. Isn't it true that many of the arguments you make in support of S.1980 have been presented to the Federal Courts and have been rejected, not on a legal basis, but on a factual one?
 - a. Didn't the 2nd Circuit find that broadcasters are not forced to accept blanket licenses?
 - b. Didn't the 2nd Circuit find that there are viable alternatives to the blanket licensing system, including direct licensing, per program licensing, and source licensing?
 - c. Didn't the 2nd Circuit find that the blanket license fee was negotiated properly between the parties and that the rate was reasonable?

ANSWER

The question now before the Congress was not resolved by the 2nd Circuit in the Buffalo Broadcasting case. In that antitrust lawsuit, the court of appeals, based on its review of the trial record, ruled that the broadcasters had failed conclusively as a matter of law to prove that alternatives to the blanket license are not "realistically available." It did not conclude that any of the suggested alternatives was, in fact, realistically or practically available.

To be sure, the appeals court, virtually ignoring the detailed findings of fact by the trial court, speculated as to whether other alternatives might be available. But this speculation bears little resemblance to the real world circumstances confronting the television broadcasters. This speculation is dicta only, with few actual facts to support it. For example, the court of appeals suggested that the broadcasters could simply "aggregate their demand" and thereby secure source licensing from the Hollywood studios. But this "solution" ignores: a) the competitive realities of the marketplace in which the local stations operate, where syndicators can easily hold out in a given market for a buyer who, eager to acquire top product, will pay the requested price and not demand source licensing; b) the

likelihood that a banding together by the broadcasters to secure changes in an entrenched industry practice would be responded to with threatened or actual antitrust litigation on the part of the studios' and c) the actual record of repeated instances in which specific requests directed to the studios by numerous individual broadcasters -- with specific offers to pay money -- have been met with absolute and unequivocal refusals to provide the requested music rights.

The 2nd Circuit's theorizations about other potentially available alternatives are, if anything, even less tenable -- for instance, the notion that the broadcasters might replace the blanket license through engaging in direct licensing transactions with all of the copyright holders whose music is found in their programming. No one, on any side of the controversy, has ever seriously argued that this alternative is a practical one for the broadcasters. To the contrary, the licensing societies for years have conceded the utter impracticability of such an alternative.

Neither did the 2nd Circuit in any way determine that the blanket license fee reflected reasonable rates resulting from arms-length negotiations between the parties. All that the court of appeals noted was the existence of a judicial "rate court" mechanism under ASCAP's government consent decree. But the mere availability of this device does not provide the broadcasters with the benefits of source licensing -- namely, license fee levels determined in a freely-functioning marketplace. What the opponents of S.1980 would relegate the broadcasters to is living in an artificially-regulated market, subject to continuing judicial oversight, in circumstances where government regulation is totally unnecessary and unwarranted. The marketplace can and will work in licensing music performing rights -- witness the motion picture theater model. Why should the broadcasters be

required to petition a court, be regulated, and have their license fees artificially set when none of this is necessary?

In short, the blanket license system by definition, for syndicated television programming is, an impairment of the normal and most desirable mode of economic exchange in our system - free market arms-length bargaining, as S.1980 would ensure. therefore the real question is whether the studios have demonstrated why in this specific sphere of music copyright there is any need or justification for departing from the norm.

QUESTION

2. According to the analysis of the 2nd Circuit, S.1980 would not result in opening of the market, but instead in closing it down. If, as the Court found, there are alternatives presently available to the blanket license, if Congress passes a bill that mandates source licensing, aren't we in reality destroying all but one of the presently available licensing systems?

ANSWER

Rather than close down a freely-functioning market, S.1980 would have precisely the opposite effect. There is currently but one viable licensing technique available to the stations -- the blanket license. There is no price competition for music rights under the blanket license. The broadcaster is trapped; he cannot go anywhere to obtain market-determined prices for music. By mandating producer source licensing, all that S.1980 accomplishes is a restoration of competitive market conditions in a market in which such competition is now totally absent.

Were the producer to obtain the music performing rights on behalf of the station, it would engage in negotiations with the copyright holders and their representatives in similar fashion to the negotiations it now enters into with every single other creative talent involved in television programming. Does the market not function in these other areas? Has the market been

"closed down" in connection with the acquisition of these other creative rights? Of course not. S.1980 merely puts music licensing on a par with all other program elements. To the extent that composers' rights would further be strengthened by collective bargaining, we would have no objection to amendments permitting this. It would bring about a freely- and efficiently-functioning and competitive market in place of the current cartelized market which is characterized by the total absence of price competition.

QUESTION

3. Do you think that the producer of a brand new TV show that he hopes to syndicate to local stations, who has no idea whether he can sell it and recoup his costs, and no idea whether it will run (if he does sell it) for six weeks or six years, is likely to have paid the composer of the show's new theme song the true value of the performance rights to that music if the show, including the song, does run for years? Can the composer, particularly the unknown composer, be guaranteed under S.1980 -- as he can under the blanket license you would prohibit -- that he will receive continuing payment for continuing performance of his music?

ANSWER

The answer to this question is that the two part payment system for composers, which is reflected in an up-front payment at the time of production and further payments if and when a show is successfully syndicated, will not change. The only difference will be that composers will receive a share of the revenue local TV stations pay directly to the studio rather than receiving their continuing payments.

Under the system envisioned by S.1980 composers would be compensated as follows.

First, they would receive up-front payments for actual time expended just as they do now.

Secondly, instead of receiving ASCAP and BMI distributions, they would receive a percentage of the money stations pay to the studios for licensing the broadcast rights to the program, including the music. This percentage is called a "residual."

To use a hypothetical example, let's assume a local TV station is currently licensing the rights to broadcast Magnum P.I. for three years for a payment of \$10 million. After enactment of S.1980 the price might be \$10.3 million because it would be adjusted to reflect a payment for the music. The station would pay this amount, either in one lump sum or in installments, to the studio which is syndicating the program - in the case of Magnum P.I., this is Universal. When Universal received the station's payment, it would then issue a check for a percentage of that payment - say two percent, or \$20,600, to the composer.

This is the same system currently in use for contributors to other copyrighted elements of the program.

Under this system composers would clearly share in the continued popularity of a program and reap even more benefits than they now receive if a show containing their music becomes especially successful. This is because the payment to the composer would be based on the price actually paid for the show by the stations, not simply in the number of times the music is played, as is now the case under the ASCAP/BMI system.

During the last year television stations across the country paid 41 percent more for syndicated shows than the year before. If S.1980 had been law and composers had received a percentage of syndication fees in lieu of ASCAP/BMI payments, which are based on station's gross advertising revenues, composers would have shared in this enormous increase in the value of programs containing their music.

The kind of residuals system envisioned by S.1980 would clearly permit composers to share in the growth of the syndication business more than the present system. Far from receiving a one-time only payment up-front, composers, like other creators currently, would share directly in the ever-increasing value of popular shows over the years.

Opponents of S.1980 argue that, because the bill does not mandate the payment of residuals, the studios would refuse to pay them. This assertion ignores the fundamental economics behind the residuals system now in place for nearly all creators who contribute to production of TV programs: writers, actors, directors and others.

In fact creators are paid residuals by the Hollywood studios because it makes economic sense to do so. By offering the creators a large portion of their compensation from future revenues which will be generated if a show goes into syndication after production costs are paid, the studio is able to secure essential creative talent with minimal up-front costs and low risks. If a show is a failure and never goes into syndication the creator will share the studio's negative risk - he or she will get nothing. If a show makes it into syndication, the creator will receive a handsome reward, but at no risk to the studio whatever.

Indeed, this principal underlies even the present ASCAP/BMI licensing system. It must be kept in mind that for 90 percent of the music affected by S.1980, the Hollywood studio, not the composer, is the actual copyright owner. Thus, the decision to license music through ASCAP and BMI and to permit the composer to receive his or her "residual" through those two organizations is a decision made by the studio, not by the composer. If the studio wished to force the composer into a one-time payment system, it could do so today, using its power as a copyright

owner. The reason it does not choose to do so is the fundamental economic rationale for residual payments discussed above.

The real reason studios now choose to pay composer residuals through ASCAP and BMI today is that for every 50 cents paid to the composer, the studio receives an identical 50 cents for itself through its music publishing subsidiary. It is this 50 cents which studios fear they might not be able to capture if required to negotiate directly with local broadcast stations. And, it is this 50 cents of the dollar which is the real focus of the reform contained in S.1980.

Local television stations have no quarrel with composers of the music in syndicated programs. They are more than willing to pay fairly for the music contained in the shows they license. They simply object to the method of payment, which permits the studios who own all of the rights in a show to avoid direct negotiation with the stations for the music rights.

To the extent that the Congress should decide to modify the legislation to assure that composers would have a statutory right to receive residual payments and to bargain collectively for minimum residuals, the broadcasters would have no objection and are prepared to work with the Committee to develop such protection.

QUESTION

4. If broadcasters gain under S.1980, who loses?

ANSWER

If broadcasters gain under S.1980 the Hollywood studios which, through their publishing subsidiaries, automatically receive 50 cents on every dollar distributed by ASCAP and BMI for music

performance rights will lose their automatic payment. This is the fundamental reform of S.1980.

Instead, the studios will have to bargain directly with stations for the value of their publisher's contribution at the time each program is licensed to a station. Rather than receiving an arbitrary annuity through ASCAP and BMI, the studios will have to justify these music fees in the marketplace.

Where the music publishing contribution has value they will be compensated.

Studios are quite capable of bargaining directly with stations to their own advantage. Within the last four years they have been successful in doubling the prices they receive from stations in direct negotiations for all rights other than music performance rights. Last year alone they were successful in extracting a 41 percent increase in prices from local TV stations.

Broadcasters are more than willing to pay for value received. This is certainly true of the creative talent reflected by a composer's or lyricist's contribution. They believe it unlikely, however, that purely paper transactions in which the so-called "publishing" right is assigned to another arm of the same studio, with little or no value added to a final product, will command a high value in the open market. It is only by applying the kind of fixed distribution formula characterizing ASCAP and BMI distributions that the studios can magnify the value of this right.

RESPONSES OF PROPONENTS TO QUESTIONS SUBMITTED BY
SENATOR MATHIAS

QUESTION

1. In your joint written submission, you quote from eight letters from various producers to member companies about the feasibility of "source" licensing. Are these letters the same letters that were submitted to Judge Gagliardi during litigation in the Buffalo Broadcasting case?

ANSWER

The eight producer/syndicator responses to source licensing requests quoted at pages 16-17 of our written submission consist of 7 letters which were submitted to the district court during the Buffalo Broadcasting trial and one recitation of a face-to-face meeting which was the subject of trial testimony at the Buffalo Broadcasting trial.

QUESTION

2. As you know, Judge Newman of the 2nd Circuit characterized these letters as a "transparent effort to assemble in the midst of litigation evidence" that source licensing had been attempted. The trial judge even though he ruled in your favor noted that "plaintiffs' source licensing foray [is] so darkened by the shadow of the approaching trial that its results may not be relied upon to support either side." Why should this committee give any greater weight to these letters than was given by the courts in the Buffalo Broadcasting case?

ANSWER

The courts in the Buffalo Broadcasting case viewed the producer/syndicator letters as pieces of evidence subject to the rigors of the rules of the law of evidence. When evaluated in that context, the courts -- improperly in our view -- determined that these letters could not be considered because of their proximity in time to the trial of the action.

However, whatever the arguable deficiencies of these letters as a matter of the law of evidence, the fact is that the producer/syndicators said what they said. And, while the timing

of the broadcaster requests to the producers/syndicators -- which, contrary to assertions frequently made by the opponents of this legislation, included unambiguous expressions of broadcaster willingness to pay additional amounts for the inclusion of all music rights clearances -- and syndicator responses may have rendered those responses inadmissible as a matter of law, those responses cannot obscure the true sentiments of the syndicators. Those sentiments were uniformly stated: the producers and syndicators will not voluntarily change the comfortable manner in which they currently do business at the behest of individual TV station source licensing requests.

We respectfully submit that the Committee should be more concerned with the merits of the issues raised by this legislation than with the technicalities of the law of evidence. If, as we understand it, this Committee sits as a body whose primary interest lies in the fair administration of our copyright system, rather than as a court of law ruling on evidentiary legal issues, then it should not shut its eyes to what the producers/syndicators actually said when asked to engage in source licensing by the local television stations. Certainly, the producers/syndicators would not deny that they meant what they said in the letters which Senator Mathias has referred to. Accordingly, there is no reason why this Committee should not consider those letters in evaluating the marketplace which S.1980 is designed to effect.

Moreover, as noted in our response to question No. 3, the producers/syndicators have continued to refuse to engage in source licensing at the request of broadcasters even after the trial in the Buffalo Broadcasting case. This subsequent experience shows that there is no reason to suspect that the pre-trial responses of the producers/syndicators are entitled to any less weight than their post-trial response, at a time when no

one can even remotely suggest that the requests or responses are legally "tainted" in any way.

QUESTION

3. What if any action have you taken or have your member companies taken since the Buffalo Broadcasting decision to negotiate source licensing?

ANSWER

Many television stations continued to seek source licensing from their suppliers of syndicated programming after the Buffalo Broadcasting decision. The testimony of Mr. Fredric Epstien of Storer Communications, Inc. ("Storer") before this Committee on April 9, 1986, as supplemented by his submission of today's date, testifies to the consistent requests made by Storer's seven TV stations to its syndicated program suppliers, and the consistently negative results thereof. Like the TV station requests made before the Buffalo Broadcasting trial, the post-trial Storer source licensing requests were accompanied by an unequivocal statement of broadcaster willingness to pay additional monies for the inclusion of source licensing; and, like the pre-trial responses, the producer/syndicators uniformly refused broadcaster efforts to negotiate source licenses. Rather than further discuss the Storer source licensing efforts here, we respectfully refer the Committee to Mr. Epstien's submissions. Other individual stations also requested source licensing from their producer/syndicator suppliers after the trial court decision, with the same result.

Certainly, the producer/syndicators' unwillingness to negotiate source licenses in the period after the TV stations' trial court triumph and before the circuit court's reversal -- the period during which producer/syndicators had every reason to begin voluntarily to engage in source licensing if they would ever do so -- speaks volumes.

In addition to these individual station requests for source licensing, representatives of the All-Industry Television Station Music License Committee met with representatives of the Alliance of Motion Picture and Television Producers on more than one occasion after the trial court decision in the Buffalo Broadcasting case to discuss the local television industry's desire to obtain syndicated programming inclusive of all music rights. The meetings were convened at the request of the broadcasters in an effort to open up a dialogue with the producers and syndicators to explore techniques for accomplishing source licensing. The producer/syndicator representatives evidenced disinterest in the broadcasters' efforts and ultimately rejected broadcaster requests for further meetings. Instead, the producer/syndicators expressed the view that they would prefer to wait for the circuit court opinion in the Buffalo Broadcasting case; in other words, they preferred not to do anything voluntarily as long as the possibility existed that they would not be compelled to change their blanket license practices by court order.

QUESTION

4. The Committee would like to have submitted for the record copies of the full text of the letters quoted in your written testimony.

ANSWER

Annexed hereto as Appendix 1 are copies of the letters quoted in the written testimony of the All-Industry Committee dated March 19, 1986, together with the quoted excerpt of the trial transcript in the Buffalo Broadcasting case.

QUESTION

5. Both in the Buffalo Broadcasting litigation, and in this legislation, broadcasters have sought to eliminate the blanket license for syndicated programming. However, both

in court and here you advocate that the blanket license be retained for locally produced programs. What is the rationale for maintaining the blanket license for local programs?

ANSWER

Local television broadcasters have sought to eliminate the local TV blanket license as it applies to their syndicated programming because of the simple fact that the blanket license alone stands between the current, anticompetitive market (in which there is absolutely no price negotiation regarding the value of music performing rights), and a source licensing marketplace which, as everyone has conceded, would be characterized by price competition. No one disputes the basic underlying facts: (i) that it is the existence of the blanket license that causes producers of syndicated programs and their composers-for-hire not to negotiate over music performing rights, but instead to jointly agree upon licensing those rights through ASCAP and BMI; (ii) that the result of licensing the music performing rights through ASCAP and BMI is that there is no price negotiation over music performing rights; and (iii) that, in the absence of the blanket license, a source licensing system would develop, in which music rights are negotiated between the producer and music copyright owner at the time the music is selected by the producer.

The reason why we have sought to enjoin the blanket license as it applies only to our syndicated, as opposed to our entire non-network program day, lies in the basic fact that we ourselves are the producers of the locally-produced portion of that program day. As such, we have readily available alternatives to the blanket license which we do not have in the case of our syndicated programming. For example, since we, as the producer, select the music for our locally-produced news, sports and public affairs shows, we can negotiate with and secure licenses from local composers and production houses to satisfy our music needs. If we prefer instead to obtain a certain piece of pre-existing ASCAP or BMI music, then we are free to contact the composer or

publisher (or its agent) of that music directly to obtain all necessary licenses from them. The bottom line is that since we are the producer, we can evaluate the competing choices and the competing prices and make a reasoned determination, in a competitive market, of what music we wish to use for our own locally-produced programs. In these circumstances, since the blanket license would not preclude competitive licensing alternatives, we have had no objection to the continued offering of some form of blanket license applicable only to locally-produced programming.

We would like to emphasize, as well, that we have never sought to eliminate the blanket license offered by ASCAP and BMI in any context other than as applied to the syndicated programs broadcast by local television stations. For example, even after passage of S.1980, ASCAP and BMI would still be free to offer blanket licenses to the producers of syndicated television programming. This, if ASCAP and BMI feel that a producer blanket license would be more efficient than source licensing transactions between producers and copyright owners and producers agree they would be absolutely free to use that licensing technique.

History is instructive here, however. In the early 1950's, in the aftermath of the Alden-Rochelle court decision and the entry of the amended ASCAP Consent Decree, which required that music performing rights be source licensed by the motion picture producers, ASCAP offered the motion picture producers blanket licenses. For a short period of time, the major studios entered into fixed-fee blanket license agreements with ASCAP pursuant to which they obtained the necessary music performing rights from ASCAP rather than from composers and publishers in face-to-face negotiations. However, when ASCAP soon thereafter sought to obtain blanket license fees based on a percentage of the studios'

revenues, the studios balked and refused to continue to blanket license agreements with ASCAP. Instead, from the mid-1950's until the current time, producers have engaged in face-to-face negotiations with composers and publishers to obtain source licenses for the theatrical performance of all music contained in their productions. That result, and nothing more, is precisely what is sought by S.1980 for television exhibition of the same music.

In sum, the broadcasters are not advocating the eradication of the blanket license system. ASCAP and BMI should be entitled to offer a blanket license to program producers -- that is, the motion picture and television studios with respect to syndicated programming, and the local broadcasters with respect to locally-produced programming -- because, in each instance, the producer as the selector of the music has other competitive options available to him. But where no "competitive" options to the blanket license exist, and where the blanket license instead operates to prevent a competitive alternative, as is the case in its application to syndicated programming of local TV stations, it should not be permitted to exist.

QUESTION

6. If S.1980 were enacted, how much do you think the average television station will save? How much is it paying now for its blanket licenses, and how much will it pay for music licensed at the source?

ANSWER

Under the current license system, local television stations have been asked to pay approximately 1.5 percent of their gross revenues to ASCAP and BMI on an annual basis. For the current year this will come to approximately \$100,000,000. These payments bear no relation to any demonstrable value which music performing rights have in contributing to the success of the stations' non network programming. The purpose of S.1980 is to

have that value determined by the marketplace, as opposed to an artificial process of "negotiation" between representatives of tens of thousands of composers and a committee of television broadcasters. There is no ASCAP or BMI which negotiates with broadcasters as to what percentage of revenues should be paid to script writers, directors, actors, choreographers, set designers, musicians, or anyone else. Our free market system has accommodated the interests of these other creative talents through the bargaining process which takes place between producer and creator. Music performing rights should be treated in exactly the same fashion.

It is impossible to determine precisely what savings would be realized by the average television station if S.1980 were enacted. There is little doubt that significant monies would continue to be paid to composers-for-hire by producers to acquire quality music for television programming. It is also clear that the local broadcasters themselves would be prepared to spend significant monies to acquire from individual composers and music packagers quality music for use on locally-produced television programming.

It is likely that one of the major beneficiaries of the current system -- the in-house music publishing affiliates of the major Hollywood studios -- may lose a significant portion of the blanket license income they now receive. But these are not productive entities in the copyright system. Their back-door payments are earned for performing absolutely no useful function. Thus, while composers as a group are likely to fare as well as or better than under the current system, the local broadcasters stand to benefit from realistic prices for the contributions of studio-owned publishers and which currently deduct nearly 20 percent of the television distributions for administration.

To the extent that savings are realized by individual stations, this will free up monies currently tied up in excessive blanket license payments for investment in better programming, better station facilities, and the commissioning of music of local composers in order to better provide for the needs of the communities which the broadcasters serve.

QUESTION

7. How will the viewing public --- the average American TV viewer -- be affected by the passage of this legislation?

ANSWER

The Hollywood production companies have asserted that they may lose as much as \$40 million a year if S.1980 is enacted. This is the sum of the payments received by their music publishing subsidiaries for the paper publishing transactions which entitle them to 50 cents on every dollar distributed by ASCAP and BMI from local television music licenses.

The studios' fear of losing this amount is based on an assumption that their "publishing" services could never command a \$40 million price in the marketplace. This sum can only be returned to them by attaching themselves to the arbitrary distribution system now administered by ASCAP and BMI.

While we doubt that studios would lose all the compensation they now receive as music publishers, we agree that they probably would never receive as much as \$40 million if they had to bargain for these publishing services in the open marketplace.

To the extent that stations limit the siphoning off of this revenue to Hollywood, the public will gain. This will occur in several ways.

First, it must be remembered that the money we are dealing with

is part of stations' expenditures for local programming. Depending on the size of the station involved, the total sum may range from tens of thousands to several million dollars per year.

Under the current system this money is not being pumped into the local creative marketplace, it is being arbitrarily siphoned out of that community and added to the bottom line of large conglomerates like Warner Communications or MCA, Inc. in Hollywood.

Local television stations are a major creative force in local communities around the country. In nearly every major market there are thousands, and in smaller markets hundreds, of creative people involved in the production of local programs: documentaries, public affairs, talk shows and the like. Stations look to their local communities not only for program content but for talent: the performers, script-writers, directors, set designers and technical personnel. In fact, local broadcasting today is the largest single employment opportunity for America's creative talent.

By siphoning off programming funds from this local market, Hollywood is restricting the opportunities for these local creators to make maximum use of the station's resources, and advertising revenue, for quality local programming. The local viewing public, which stations have a direct obligation to serve in accepting an FCC license, is not served by this.

Secondly, the local music community in particular, is denied access to the incentive of the copyright system which the law is supposed to provide.

Because local stations are forced to buy blanket licenses to 4 million works from ASCAP and BMI, covering all their programming, simply in order to receive legal clearance for their Hollywood-

produced syndicated programming, they are discouraged from commissioning local talent to compose the theme and background music for their own locally-produced programs. Since the stations have already paid for the rights to 4 million works "in the can" they are likely to select one of them to dub into the soundtrack of local programs. This serves neither local artists nor the local public, which is denied access to the original musical talent available to them in their own communities. It is ironic that local stations typically employ performers, directors, writers and set designers, but hardly ever retain a staff composer. This is a direct result of the current blanket licensing system. It violates the fundamental goals of the copyright law and harms the interest of the viewing public. It would be corrected by enactment of S.1980.

Finally, the American viewing public is served by a strong copyright system. Many new, intellectually based industries, have approached Congress in recent years seeking expansion of copyright protection. Many of these requests are legitimate and in the public interest.

However, the continuation of an outdated blanket license system under the guise of copyright - a system which generates windfall to a few rather than reward to many - discredits the entire copyright system and makes it harder to persuade the public that expansion of the monopoly rights inherent in copyright protection will not operate with adverse effect. Legitimate copyright interests should not have to carry this burden with them as they seek expansion of their rights to cover new technologies and new markets. The public is not served by the perpetuation of an outdated and inequitable system.

The public is served when the copyright system is kept modern and efficient, when it permits each and every intellectual creation

to be judged for its own commercial merit and to receive full reward for that merit. Sometimes that means expanding existing rights or creating new ones where they do not now exist. However, it can also mean recognizing modern technological realities in a field such as television and in streamlining the law in ways such as that provided in S.1980.

QUESTION

8. During the Buffalo Broadcasting case various broadcasters sent out some 200 letters to producers of television programs. Did any of these producers or syndicators agree to provide pre-cleared "source licensed" programs to television stations?
9. If there was a positive response by any producer or syndicator, how many stations made an affirmative response to such an offer and entered into agreements for programming that had already had the performance right pre-cleared by the program supplier?

ANSWER

Of the approximately 215 local television station requests for clearance at the source made to producers and/or distributors of syndicated programming, 25 requests (or approximately 15 percent) generated a signed music rights addenda from the producer or syndicator which ostensibly granted the station a source license. (In at least five of these instances, however, the syndicator subsequently corrected itself and indicated in writing its refusal to convey music performing rights as part of the program package.)

Contrary to the views sometimes expressed by the opponents of S.1980, these limited positive responses to station source licensing requests do not in the least detract from the ultimate conclusion that a source licensing system is not attainable by the stations. For these positive responses are notably insignificant in terms of the stations' total licensing posture, for the following reasons.

First, it has not been (and cannot be) denied that the syndicators who signed local stations' music rights addenda play virtually no role in the distribution of off-network programs or of other desirable syndicated product. The minor market position of those few who said "yes" to stations' requests need only be compared to the enormous syndication market shares of the major Hollywood studios and the other leading distributors who uniformly said "No!" to stations' source licensing requests. When one considers that the syndicators which refused station requests accounted for approximately 90 percent of all off-network syndication and 65 percent of all-series syndication, the total meaninglessness of the stations' ability to obtain a few source clearances from the minor players becomes readily apparent.

It is also telling that, apart from their lack of market power, the syndicators who executed stations' music rights addenda typically are not identifiable as the recipients of significant television distributions from ASCAP or BMI. In contrast, the eight major Hollywood studios and other leading syndicators who refused stations' source licensing requests were affiliated with (or owned) about 40 different music publishers which were among the leading ASCAP/BMI publishers in terms of television distributions.

In light of all this, the contention sometimes advanced by the opponents of S.1980 that local stations could avoid the restraining effect of the blanket license by acquiring syndicated programming from the syndicators who signed stations' music rights addenda is incorrect. It misconceives the business of local television stations. The primary function of local stations is neither to acquire music performance rights nor simply to fill air time. The stations are in the business of broadcasting programs which the American public wants to see and

which therefore generate the advertising revenues necessary to operate the stations. To suggest that local stations can subsist on a steady diet of programs for which source licenses were obtained (e.g., "Paul Strassels' Tax Report," "Today's Woman," "Health Field") is to ignore marketplace reality: stations must compete aggressively for the attractive syndicated product offered by the major Hollywood studios and the other leading distributors.

Finally, it is noteworthy that the syndicators who signed station source licensing addenda did not insist upon additional payment for music performing rights clearances. For one thing, this fact contradicts the frequent assertions of the opponents of S.1980 that stations cannot expect to receive any source licenses unless they do more than indicate a willingness to pay extra for source licenses (which they have done). It also casts serious doubt upon the opponents' repeated claims about the value of music performing rights to all syndicated programming, for it reflects that, at least in these syndicated shows, the contribution of the music to the program was deemed by the syndicator to be so insignificant that no extra fee was deemed necessary.

QUESTION

10. Has any company in any of your organizations ever attempted to negotiate directly with a composer for music performance rights in a particular program? What was the result?

ANSWER

The answer to this question is: "no", with respect to syndicated television programming, and "yes", with respect to locally-produced programming.

Direct license requests - syndicated programming: the opponents of S.1980 have sometimes claimed that because the relationships between the music licensing societies and their members are no

longer exclusive, local television stations are free to enter into direct licensing transactions with the thousands of composers and publishers whose works are contained in syndicated television programming. But the theoretical "availability" of this "direct licensing" option as a technical matter misses the point. That is because everyone -- from ASCAP's former general counsel and own in-house economist to leading BMI composer Mike Post, who testified just weeks ago before this Committee and Representative Kastenmeier's House Subcommittee -- has conceded the utter unavailability of direct licensing as a viable option. For example, according to ASCAP, it would be "impossibly difficult and expensive." There is simply, as ASCAP's general counsel of 40 years put it, "no practical way ... for a writer or publisher to work out individual licenses with individual broadcasters." Mr. Post put it even more bluntly when he recently testified before Representative Kastenmeier's Subcommittee that "there is no way that a local TV station could contact, much less pay each composer for each piece of music that they use each day."

Given the conceded impossibility of an individual TV station accomplishing direct licensing for its station's syndicated programs, certainly stations should not now be taken to task for not having engaged in such a futile endeavor. This is especially so in light of Mr. Post's testimony before Representative Kastenmeier's Subcommittee candidly indicating that, apart from the infeasibility of the so-called direct licensing alternative for syndicated programs, there is the additional factor that BMI composers, like he, even if asked to engage in direct license transactions with local TV stations, would have refused to do so in preference to licensing under the blanket license -- even if a premium were offered by the local station.

Direct license requests - locally-produced programming: As noted

in response to a previous question to Mr. Arries, in light of the broadcasters' need to obtain a blanket license to cover the music contained in their syndicated programs, and the absence of a carve-out provision in the blanket license which would enable stations to reduce their blanket license fees were they able to obtain direct or source licenses for their locally-produced programming, stations also have little-to-no incentive to seek direct licenses from composers or music suppliers for their locally-produced programming.

Notwithstanding that fact, and in large measure due to the potential for carve-out relief which existed for a brief period of time under the judgment entered after the trial court decision in the Buffalo Broadcasting case, some stations (including, e.g., the Storer Communications stations) have sought to obtain music rights directly from composers and publishers for use in their locally-produced programming. And, the stations have been successful in obtaining direct or source licenses from local composers and music production houses. This result is exemplified by the papers filed by the seven Storer stations in support of their application for a reduction in license fees under the Buffalo Broadcasting judgment referred to in Mr. Arries' responses.

It bears repeating, however, that a local station's ability to obtain direct or source licenses for its locally-produced programming, where the station is the producer who selects the music and therefore has a variety of competitive licensing alternatives to choose from, does nothing to solve the problem which this legislation is designed to solve -- that is, the utter inability of stations to obtain direct, source or any other competitive form of licensing for the music performing rights contained in their syndicated programming.

QUESTION

11. Since your testimony indicates that you believe it would be too burdensome for television stations to contact every composer to clear the rights in the programming they air, why do you think this burden should be placed on producers and syndicators?

How would a producer or syndicator be any less burdened than a television station, if this legislation was enacted and the producer were required to negotiate for the performance rights in programming that may have been filmed more than 20 years ago?

ANSWER

As noted in response to question 10 above, the problem of the burden of direct licensing on individual television stations relates only to the stations' syndicated programming. That burden stems from the fact that, were individual stations to seek to obtain direct licenses for each of their syndicated programs they would have to: (i) first identify each and every composer and publisher whose music was contained in each separate syndicated program episode which it aired, (ii) locate each such composer or publisher, and (iii) then seek to negotiate a license fee for each composition contained in each program. The conceded burden of such a task derives in large measure from the fact that syndicated programs are produced years before they are acquired by local television stations, who had no involvement whatsoever in the initial selection of the music.

Directly to the contrary, a producer would face no burden were it to obtain music performing rights licenses at the source from the composers and publishers who music is used in a syndicated program. After all, the producers already obtain synchronization and other copyright rights for the very same music contained in syndicated programming in face-to-face licensing transactions with the very same composers and publishers with whom they would deal for television performing rights in a source licensing marketplace. No extra meetings would be required; there would be no difficulty in tracking down or identifying composers and

publishers; in fact, as ASCAP has conceded, the machinery is there, "oiled and ready to go", for producers of syndicated programming to clear music performing rights at the source.

Even with respect to pre-existing compositions used for syndicated programming, a channel for negotiations between the producer and the copyright owners to obtain music performing rights already exists. The Harry Fox Agency today issues to **producers** quotations and licenses for motion picture **synchronisation** and theatrical performing rights as well as for television synchronization rights, and could easily and practically issue quotations and licenses to them for television performing rights in the context of these very same transactions.

QUESTION

12. The market model to which you point as precedent for this legislation is theatrical exhibition of motion pictures. In this country, source licensing prevails in theatres. However, the composer of music for the movies anticipates that performance of his music will be compensated not just from theatrical exhibition in the U.S., but also from such exhibition abroad where a performance royalty will be paid. In addition the composer anticipates revenue from TV, cable, and other exhibitions covered by some form of blanket license. Wouldn't passage of S.1980 have a dramatic effect on the current arrangement for compensating composers of music for the movies?

ANSWER

No. As indicated in the response to question number five, from Senator Laxalt to the National Association of Broadcasters, enactment of S.1980 will have no effect on foreign compensation of U.S. composers.

With respect to revenue paid to composers of music in theatrical motion pictures which are syndicated in the TV marketplace, composers will continue to receive compensation as described in the answer of Les Arries to Senator Spector's question number one.

QUESTION

13. With regard to the theatrical exhibition model, my understanding is that theatrical exhibition licenses are generally calculated as a percentage of the gross gate receipts, not as a flat fee as in the case of TV syndication. How would your industry react to a proposal that required syndication licenses to be sold for a percentage of gross station revenue? Do you think the whole model should be emulated, or only part of it?

ANSWER

The fundamental goal of S.1980 is to bring into the competitive marketplace the licensing of the performance right in music in syndicated television programs. The performance rights in music contained in motion pictures licensed for theatrical exhibition currently are licensed under such competitive marketplace conditions.

To the extent that direct negotiations between individual buyers and sellers produce a pattern in which all performance rights in a film or other audio visual work are paid for out of gross box office receipts, that is the system produced by a free market. It is the system that motion picture exhibitors have agreed to in direct negotiations between individual buyers and sellers.

Should such free marketplace negotiations result in a similar pattern of compensation for television exhibition, broadcasters can have no complaint. In fact, many stations, particularly independents, already do license programs under arrangements in which they share advertising revenue or offer the producer the advertising spot directly. The point is that all of these arrangements are voluntarily agreed to by both sides after face-to-face negotiations. The present system of licensing TV rights, other than music, clearly is preferred by syndicators, just as they prefer different arrangements for theaters.

The blanket license for music, however, is not the result of marketplace negotiation, nor was its use for theaters many years ago the result of one-on-one marketplace negotiations. Indeed, theaters were only able to free themselves of it by government intervention in the form of an anti-trust consent decree.

S.1980 will not mandate particular business arrangements between studios and stations anymore than the Department of Justice has mandated such arrangements between studios and theaters. It

will, rather, open up the system to marketplace determination of these arrangements. Thus, stations are clearly willing to follow the pattern of direct negotiation of the method and amount of compensation which have characterized the relationships between theaters and studios.

[Attachments to responses of proponents to questions submitted by Senator Mathias follow:]

[Attachments]

lh

Willoughby-cross

1177

MR. QUINN: Objection. Is that a question, a speech, an argument? What is it? It didn't sound much like a question.

THE COURT: Yes. Sustained.

Q. Mr. Willoughby, you said you were there speaking only on behalf of King, correct?

A. Correct.

Q. You said you would be willing to consider paying King's share of any costs that MCA incurred in obtaining -- correct? You would be willing to pay King's share of those costs?

A. Of the costs they incurred to acquire the music performance rights.

Q. That's correct.

A. Yes.

Q. Who would pay the remaining portions of those costs beyond what your share was?

A. Well, my whole proposition was on the basis that if they obtain source licensing, everyone is going to have source licensing, all exhibitors will be able to take advantage of programming furnished with music rights already covered. We wouldn't have to have a blanket license, we wouldn't have to be here in court.

Q. So if MCA cleared the music for the Rockford

1h

Willoughby-cross

1178

Files at the source and went to you and you paid your share and then they went to a number of other television stations and said "we know you have a contract for Rockford Files which has a price term, but we have gone out and we have cleared this music at the source, and now we want you to pay additional monies for those rights," and those television stations said "we are not interested," MCA would suffer the loss, correct?

MR. QUINN: Objection.

THE COURT: Sustained.

Q. Mr. Willoughby, let me summarize it this way.

THE COURT: Isn't this argumentative?

Q. At the meeting with Mr. Hadl and Mr. Goodman, didn't they tell you that they didn't understand that there was anything in it for MCA as a business proposition to clear music performance rights for programs that were already in the can, didn't they tell you that?

A. They told me that and they told me there was nothing in it for them to clear any of the performance rights.

Q. You told them you weren't sure that there was anything in it for them as a business proposition to clear music performance rights for music that's in the

PX 1A-1 (p. 3)

David A. Drilling
Deputy General Counsel



September 30, 1981

Mr. Arnold L. Wadler
Metromedia, Inc.
1 Harmon Plaza
Secaucus, New Jersey 07094

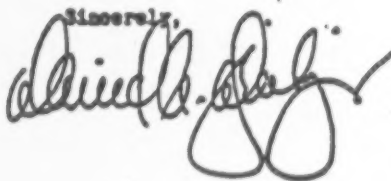
Re: Music Performance Rights

Gentlemen:

Reference is made to your letter of April 14, 1981, with respect to music performance rights fees. As you are aware, music performance rights licenses are included in the rights package for theatrical distribution of motion pictures pursuant to a court decision mandating such inclusion. However, it is not current industry practice for music performing rights licenses to be included in connection with the television exhibition of motion pictures.

Accordingly, we do not believe it feasible for us to clear music performance rights licenses for television exhibition at the program supplier level.

If you have any questions, please feel free to contact me.

Sincerely,


DAD/mn

cc: Mr. Zaleski



Columbia Pictures Television
Distribution

PX 1C-7 (p. 12)

Marlynda Salas
Secretary of Syndicated Sales
Administration

September 21, 1981

Mr. Ralph Webb
Program Manager
KWTX Broadcasting Co.
4320 Bosque Blvd.
Waco, TX 76710

Re: License Agreement No. 7679
"Goliath Awaits"

Dear Mr. Webb:

Enclosed please find a fully executed copy of the above referenced license agreement.

We regret that Columbia Pictures Television is unable to agree to your proposal that it obtain music performance licenses in connection with the instant license agreement.

Columbia Pictures Television has obtained all necessary music synchronization licenses for the program subject to this license agreement. In accordance with long-standing industry custom and practice, it is the responsibility of the station which exhibits the program to obtain the music performance licenses.

Thank you.

Sincerely,

Marlynda Salas

MS/jk

Enclosure

PX 88

Paramount Pictures Corporation

November 10, 1981

Francis A. Martin III
President
Chronicle Broadcasting Company
1001 Van Ness Avenue
San Francisco, California 94109

RE: MUSIC PERFORMANCE RIGHTS CLAUSES

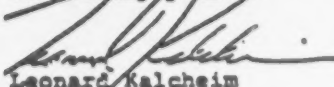
Dear Mr. Martin:

Richard Frank has referred your October 7, 1981 letter to me for reply.

Your suggestion for Paramount to clear music contained in syndicated programs "at the source" is impractical. The properties Paramount currently distributes consist for the most part of theatrical feature films or off-network television series where the music included was never cleared at the source. To do so now would be to undertake an unnecessarily burdensome job when compared to the long standing industry practice.

With regard to first run productions, we do not agree with the statement in your letter that the total expenditure for music performance rights would be considerably less than those fees currently paid by your stations. Notwithstanding this, Paramount is willing to consider any fair and concrete plan that Chronicle, as a valued customer, would like to propose in connection with the acquisition of music performance rights.

Very truly yours,



Leonard Kalcheim

LK/1

cc: Richard Frank

PX 87 C



WARNER COMMUNICATIONS INC.



November 13, 1961

Alfred L. Schwartz, Esq.
 Metromedia, Inc.
 1 Madison Plaza
 New York, N. Y. 10017

Dear Al:

Your letter of November 10, 1961 is a welcome reminder to do what I had been, with all good intentions, planning on doing for a few weeks, namely, asking you and Arnold to join me again for lunch so that we can resume discussion of the question you raised.

As I told you I would, I discussed the question with my principals and, as I predicted, we are left with a great many questions which perhaps you can answer. The questions go fundamentally to the economic benefit, if any, to be derived by Warner if it undertook to clear music as you suggest. You may already have some ideas on the score or you may want to give it some thought.

Please call me at your first convenience so that we can set up a date for another meeting.

Kindest regards.

Sincerely,

Samuel R. Reddis
 Samuel R. Reddis

RGS:CO

A Transamerica Company

New York, New York
(212) 678-3000

PX 1F-2 (p. 3)

July 27, 1981

Storer Broadcasting Company
Miami Beach Office

RECEIVED JUL 28 1981

A. A. CHURCH

Mr. Abiah A. Church
Vice President
Storer Broadcasting Company
1177 Kane Concourse
Miami Beach, Florida 33154

RE: MUSIC PERFORMANCE RIGHTS FEE

Dear Mr. Church:

We acknowledge receipt of your letter dated July 2, 1981 requesting that United Artists Television Inc. change its current form of licensing to include a warranty stating that all monies owed to music performance rights societies have been satisfied by the distributor.

United Artists is unable at this time and in the foreseeable future to change the framework and nature of the licensing agreements for our motion pictures. After exploring the equities we have determined that the proposed modification would be violative of the policies for which "performing rights" were originally instituted and would deny these organizations their rightful share of the gross receipts of the party fully benefitting from the use of the musical property.

We appreciate your inquiry, however it would be both undesirable and inappropriate for United Artists to adopt your proposed modification. Unless there are significant changes in the structuring and policies of performing rights agencies, we do hope this issue will remain closed for any current as well as all future negotiations with Storer.

Very truly yours,

David Cornell
David Cornell

DC:maf

cc A. Sporer
M. Robinson



EDWARD A. HOFFMAN
VICE PRESIDENT
TELEVISION LEGAL AFFAIRS

PX 1G-2 (p. 7)

001 - 4 - 1001

J. A. STABILE

October 26, 1981

James A. Stabile, Esq.
Associate General Counsel
Metromedia, Inc.
5746 Sunset Boulevard
Los Angeles, California 90028

Dear Jim:

It is conceivable, and it did occur to me shortly after our brief telephone conversation, that you did not basically understand my premise. What I am trying to say in the most succinct manner I can express it is that Fox is not interested in changing the manner in which we are currently doing business with our various licensees. It seems to me that it is your feeling that you want to change the business. Since we are continually doing business and have been doing so for a number of years, we have tried to be courteous in alerting you to the fact that there were several issues to be dealt with that were not quite so cavalierly handled as to simply tell you "NO!" If you are as serious as you claim, and if you want to alter the current manner in which we do business, then my suggestion is that it is your responsibility to advise us in what manner you would like to do this.

At the risk of being redundant, we have told you in the past, as we have told every other licensee who is asking this simultaneously, that we would not even consider clearing music at the source by simply adding a provision to our contracts. Our response was intended to suggest as peripherally as we could some of the issues which exist. We really aren't in a position to answer the questions that you suggest, since it is you who are seeking to alter the course of business. If you wish us to consider the matter, please submit a proposal and I will see that your proposal is considered by those corporate executives whose job it is to make this decision.

Very truly yours,

 A handwritten signature in dark ink, appearing to read "Edward A. Hoffman".

EDWARD A. HOFFMAN

EAH:b1

MN 06127

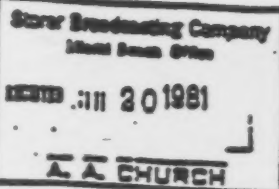


METRO-GOLDWYN-MAYER FILM CO. 12302 W. Washington Blvd., Culver City, California 90230 (213) 246-2000

PK 1E-1 (p. 7)

July 17, 1981

Mr. Abiah A. Church
Vice President, General Counsel
Storer Broadcasting Company
1177 Kane Concourse
Miami Beach, FL 33134



Re: Music Performance Rights Fees

Dear Mr. Church:

Your letter of July 2, 1981 to Mr. Joseph C. Tirinato has been referred to me for response. We are not willing to comply with your proposal for altering the music warranty paragraph of the television syndication agreements between MGM and Storer.

The customary type of license which MGM receives from the music publishing companies is a license to synchronize the music on our motion picture soundtracks and to performance of such music in motion picture theatres only; the performance grant is always subject to clearance by television stations or networks of the performance rights from ASCAP or BMI. We have entered into innumerable licenses of this type for our many features and television programs over the years and these are the only kinds of licenses music publishers issue to us at the present time.

It would be virtually impossible for MGM to renegotiate its music licenses to include television performances, and in any event, the fee that MGM would have to pay to secure such a performance license covering television networks and stations (if we could get such rights) would be prohibitively high and could never be recouped even if the license fees charged to broadcasters like Storer were substantially increased. Further, it would be impossible for us to coordinate the securing of music performance licenses for television unless every television station licensed by us around the country agreed to increase the basic license fee paid to us to offset our expenditure in securing those rights for them. As you can imagine, this would be a mammoth task doomed to failure from the outset.

The kind of music warranty contained in our current television licenses is the only warranty which we are legally able to grant in view of our many existing music licenses as well as the form of music license which is customarily issued by music publishers. We, therefore, cannot agree to any change in our current music warranty clause nor are we willing to change the way we do business.

Very truly yours,

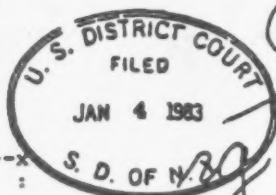
Anita R. Van Petten

Anita R. Van Petten
Attorney at Law

ARVP/12

A-2103

Cagliardi, J.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BUFFALO BROADCASTING COMPANY, INC., :
et al., :

Plaintiffs, :

-against- :

AMERICAN SOCIETY OF COMPOSERS, :
AUTHORS AND PUBLISHERS, et al., :
and BROADCAST MUSIC, INC., et al. :

Defendants. :
-----x

78 Civ. 5670 (LPG)

JUDGMENT AND
PERMANENT
INJUNCTION

The Court, after trial, having entered an opinion and order, dated August 19, 1982, granting judgment in favor of plaintiffs and the plaintiff class against defendants and the defendant classes, all as more fully set forth in the Court's opinion and order; now, therefore,

IT IS ORDERED AND ADJUDGED:

I.

As used in this Judgment:

(A) "ASCAP" means defendant American Society of Composers, Authors and Publishers;

(B) "BMI" means defendant Broadcast Music, Inc.;

(C) The defendant "ASCAP class" means all persons or entities who are members of ASCAP, as of the date of entry of this Judgment, and from whom ASCAP obtains the nonexclusive right to license performing rights to third parties;

(D) The defendant "BMI class" means all persons or entities who are affiliates of BMI, as of the date of entry of this Judgment, and from whom BMI obtains the nonexclusive right to license performing rights to third parties;

(E) "Defendant classes" means the defendant "ASCAP class" and the defendant "BMI class";

(F) "Local television station" means any commercial television station in the United States licensed by the Federal Communications Commission to broadcast a television signal;

(G) "Plaintiff class" means all persons or entities who, since November 27, 1978, have owned a local television station as defined above, and have obtained, prior to the date of entry of this Judgment, performing rights for their local television station pursuant to music license agreements with ASCAP and/or BMI, excluding, however, CBS, Inc., National Broadcasting Company, Inc., American Broadcasting Companies, Inc. and WSM, Inc.;

(H) "Network program" means any program broadcast by two or more local television stations simultaneously and for which broadcast rights are obtained by the local television stations from either CBS Inc., National Broadcasting Company, Inc. or American Broadcasting Companies, Inc.;

(I) "Syndicated program" means any program which is offered for sale or license to any local television station owned by any member of the plaintiff class for broadcast as a non-network program, including regional or national commercial advertisements contracted for by a local television station;

(J) "Locally produced program" means any program which has been produced by or on behalf of any local television station owned by any member of the plaintiff class, including commercial advertisements produced by a local television station or for broadcast in a specific local television market;

(K) "Performing right" means the right under the Copyright Laws of the United States to make a non-dramatic public performance of a copyrighted musical composition; and

(L) "Produced" means, with respect to any program,

the point in time when the production process has been completed.

II.

Commencing on the effective date of this Judgment (as provided for in Section X herein), and except as may otherwise be ordered by this Court (in accordance with Section VII(A)(ii) hereof), ASCAP and BMI are permanently enjoined and restrained from granting to any local television station owned by a plaintiff class member performing rights in any syndicated program.

III.

Nothing in this Judgment shall be construed to enjoin and restrain ASCAP and BMI from granting to any local television station owned by a plaintiff class member any form of mutually agreed upon license covering performing rights in locally produced programs.

IV.

Commencing on the effective date of this Judgment (as provided for in Section X herein), and except as may otherwise be ordered by this Court (in accordance with Section VII(A)(ii) hereof), all members of the defendant classes are permanently enjoined and restrained from authorizing any performing rights society to grant to any local television station owned by a plaintiff class member performing rights in any syndicated program.

V.

The provisions of this Judgment applicable to ASCAP, BMI and the defendant classes shall apply to each such defendant or defendant class member, as the case may be, its successors and assigns, and to each of their officers, directors, agents, employees, and to all other persons acting or claiming to act under, through or for such defendant or defendant class member.

VI.

ASCAP and BMI are ordered and directed, at their expense, to mail copies of this Judgment to all members of the ASCAP class, in the case of ASCAP, and all members of the BMI class, in the case of BMI, within sixty days of the date of entry of this Judgment; and in that connection, ASCAP and BMI are further ordered and directed to include therein a notice, approved by the Court, that all such class members will be bound by the terms of this Judgment.

VII.

(A) Jurisdiction of this cause is retained:

(i) for a determination of damages, if any, to which plaintiffs and the plaintiff class may be entitled, pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, including any further discovery and submission of evidence as may be appropriate to such determination;

(ii) for a determination of the appropriate manner, method and amount of payment for local television station performing rights for music contained in syndicated and locally produced programs produced prior to the effective date of this Judgment or for which a local television station owned by a plaintiff class member has obtained broadcast rights prior to the effective date of this Judgment, including any further discovery and submission of evidence as may be appropriate to such determination; and

(iii) for a determination of the reasonable attorneys' fees of plaintiffs and the plaintiff class in the prosecution of this action and such other costs and fees to which plaintiffs may be entitled by law, including any further discovery and submission of evidence as may be appropriate to such determination.

(B) The funds deposited and existing in the escrow accounts, established pursuant to the Stipulation and Order dated December 15, 1978, as modified by a letter agreement dated June 30, 1980, in the case of BMI, and by the letter agreement between the parties dated December 15, 1978, as modified by a letter agreement dated June 10, 1980, in the case of ASCAP, shall remain in the escrow accounts pending the determination of damages, if any, referred to in Section VII(A) herein.

VIII.

(A) During the period of time commencing with the first day of the calendar month following the month in which this Judgment is signed by the Court and ending on the effective date of this Judgment (as provided for in Section X herein), any local television station owned by a plaintiff class member shall be entitled to obtain blanket licenses from ASCAP and BMI (hereinafter the "interim blanket license(s)"), on the terms and conditions hereafter set forth, by paying the license fees prescribed herein and by otherwise complying with said terms and conditions;

(B) Except as hereafter provided, the interim blanket licenses shall be in the same form and contain the same terms and conditions as the blanket licenses with the local television stations which have existed, in the case of ASCAP, pursuant to the terms of a letter agreement between the parties dated December 15, 1978, as modified by a letter agreement dated June 10, 1980, and, in the case of BMI, pursuant to the terms of the Stipulation and Order, dated December 15, 1978, as modified by a letter agreement dated June 30, 1980;

(C) The interim blanket licenses shall be terminable on the grounds set forth therein and, in addition, shall be terminable by any local station at the end of the next succeeding calendar month, upon the giving of thirty (30) days' notice;

(D) The fees payable for an interim blanket license shall be:

(i) for any local station owned by a plaintiff class member which operated under an ASCAP and BMI license in 1980, amounts equal to the amounts such station was obligated to pay to ASCAP and BMI in license fees for the year 1980, payable in monthly installments on an annualized basis; or

(ii) for any local station owned by a plaintiff class member which did not have an ASCAP or BMI license during 1980, but thereafter obtained a license from ASCAP and BMI, amounts equal to the product of (a) the amounts such station will have been obligated to pay ASCAP and BMI in license fees for the year 1982, and (b) the ratio of the amounts obligated to be paid by the plaintiff class members for 1980 to the amounts obligated to be paid by the plaintiff class members for 1982, payable in monthly installments on an annualized basis.

(E) At any time before the effective date of this Judgment (as provided for in Section X herein), should the effective date be extended beyond one year from the date of the Judgment, counsel for the plaintiff class may, on behalf of the class, apply to the Court for a reduction in the fees to be paid for the interim blanket licenses; any reduction thereafter ordered by the Court shall be retroactive to the date of the making of the application.

(F) At any time after this judgment is entered, the plaintiff class or any local television station owned by a plaintiff class member may apply to this Court for a prospective reduction in the amount of the interim blanket license fees based upon a showing that such local station(s) have obtained performing rights licenses from parties other than ASCAP and BMI.

(G) All fees paid under the interim blanket

licenses shall be without prejudice either to plaintiffs' right to claim damages in accordance with paragraph VII(A)(1) of this Judgment during the interim license period or ASCAP's or BMI's right to seek a retroactive adjustment of such fees following the resolution of all appeals which may be taken from this Court's August 19, 1982 Opinion and this Judgment.

(H) Nothing contained herein shall require any local television station owned by a plaintiff class member to obtain a license from ASCAP or BMI.

IX.

(A) Each member of the plaintiff class, or any or all of them jointly, shall have the right to seek enforcement of, or sanctions and punishments for violations of, this Judgment against ASCAP, BMI or any defendant class member. Any such petition for a modification, construction, interpretation or clarification of this Judgment or any enforcement proceeding which, in the opinion of the Court, may require such a modification, construction, interpretation or clarification, shall proceed as a class action on behalf of or against, as the case may be, the plaintiff class or the defendant classes if it appears that the interests of the absent members of the class may be affected.

(B) Notwithstanding any other provisions hereof, after a minimum period of five years from the effective date of this Judgment, ASCAP or BMI may make an application to the Court for the right to license performing rights in syndicated programs through a form of per program license or such other manner as the Court at that time may find not inconsistent with the terms and effect of this Judgment.

K.

The effective date of this Judgment shall be February 1, 1984. Any party may make an application to the court for a postponement of such date, which application may be granted upon such terms as the Court determines appropriate.

✓ Dated: January 3, 1983
~~December 2, 1982~~
 New York, New York

L. G. G. G.
 S. J. J.

JUDGMENT ENTERED 1/4/83
Raymond F. Burghardt
 CLERK

Senator MATHIAS. All right.

We will move along then.

Thank you, gentlemen.

Panel No. 2. Mr. Edward M. Cramer, president of Broadcast Music, Inc., New York; Mr. Hal David, president of the American Society of Composers, Artists, and Publishers; Mr. W. Robert Thompson, president of SESAC, Nashville, TN; and Mr. Mike Post of Post Productions, Studio City, CA.

Mr. Cramer.

STATEMENTS OF A PANEL CONSISTING OF EDWARD M. CRAMER, PRESIDENT AND CHIEF EXECUTIVE OFFICER, BROADCAST MUSIC, INC.; HAL DAVID, PRESIDENT, AMERICAN SOCIETY OF COMPOSERS, ARTISTS, AND PUBLISHERS, NEW YORK, NY; W. ROBERT THOMPSON, PRESIDENT OF SESAC, INC., NASHVILLE, TN, ACCOMPANIED BY NICHOLAS ARCOMANO, VICE PRESIDENT AND COUNSEL; AND MIKE POST, POST PRODUCTIONS, STUDIO CITY, CA

Mr. DAVID. Mr. Chairman and members of this committee, I am Hal David, the president of ASCAP. And with your permission, I would like to read a letter from one of America's greatest composers, addressed to the chairman of this committee.

DEAR SENATOR MATHIAS: I am told that if S. 1980 becomes the law, it would end blanket licenses for local television stations. As a member of ASCAP since it was organized, I know that the present system works. This system has been beneficial for the songwriters, the broadcasters, and the public. A new method of licensing would be an attempt to change something that does not need changing and would

threaten the livelihood of American songwriters. I respectfully urge you to oppose S. 1980.

Signed, "Irving Berlin."

I would love to give this to you if I may.

[Letter follows:]

IRVING BERLIN

March 14th, 1986

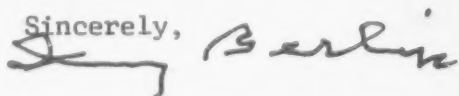
The Honorable Charles McC. Mathias
U. S. Senate
387 Russell Senate Office Building
Washington, D. C. 20510

Dear Senator Mathias:

I am told that if S.1980 becomes the law, it would end blanket licenses for local television stations.

As a member of ASCAP since it was organized, I know that the present system works. This system has been beneficial for the songwriters, the broadcasters and the public. A new method of licensing would be an attempt to change something that does not need changing and would threaten the livelihood of American songwriters.

I respectfully urge you to oppose S.1980.

Sincerely,


I
B
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h
s

Senator MATHIAS. Thank you very much.

Mr. DAVID. Mr. Chairman and members of this committee, I am here as a songwriter and as president of ASCAP. I represent a great many songwriters who will suffer great economic hardship if this legislation passes. We strongly believe this bill is unconscionable special interest legislation. It will seriously erode the incentive to create music and cheat the American public by reducing the quality of our music. None of us can fathom why there is a need to go to Congress with this issue.

For the last 40 years, off and on, ASCAP has negotiated with the broadcasters, the same broadcasters who are urging this legislation over music performance rights. As in any negotiation, sometimes they won a point, sometimes we won a point, but eventually a bargain was always struck. Why then should Congress now be asked to intervene on the broadcasters' side in this successful practical bargaining process?

For over 6 years, from 1978 to 1984, ASCAP heard the same allegations about no available alternatives to blanket licenses, about take it or leave it inflated prices. But less than 18 months ago, the Second Circuit Court of Appeals, having examined all the arguments and evidence, rejected every one of these charges as false and unfounded. Why then should Congress now be asked to uphold the very same claims that were found to be invalid?

For the last 11 months, ASCAP has been engaged in a rate proceeding with these same broadcasters before the Federal court in New York, which must approve the fairness of any contested fee. I do not know what the fee will be when it is finally approved, but I do know that we have the burden of proof. So, why then should Congress now be asked by the broadcasters to bypass the pending judicial proceeding, the very same proceeding that the broadcasters themselves have sought?

ASCAP wants to get along with the broadcasters. They are among our most important customers. Why do they feel this legislation is necessary? What do they want?

They say they want the local TV stations to obtain the music-performing rights at the same time they obtain all other rights for syndicated programs, just as the movie theaters do. Well, they already can. It is called source licensing, and the courts have explicitly found it to be available under the present law.

They say they want to be free to reject a blanket license when a limited amount of music is used on locally originated programs. They already can.

They say they want a music-licensing system that rewards those whose music is played repeatedly more than those whose music is seldom played. It already does, because that is the way our system operates, and this bill would upset a proven way of doing business.

If all that is true, you may ask why cannot the broadcasters and songwriters decide among themselves by what method and for what price music performance rights are to be conveyed to local TV? We already can and we will, if Congress makes it clear that it will not be a party to inhibiting these negotiations by tilting the bargaining table.

What do the broadcasters really want? They really want our music without paying for it.

They would have Congress remove all alternative forms of licensing except source licensing. They would give us one choice, and one choice only, in selling the performing rights to our music on syndicated TV shows, and that is to sell those rights to the producer at a time when he cannot possibly know whether the show will succeed, whether the music will succeed, or whether he will even recoup his production costs. I ask you how much will a composer receive under those circumstances?

Well, anyone, who knows, knows the answer is very little, and that is for the experienced composer. For the newcomer, there would simply be no future at all.

And that is what this bill is all about, the future of American music.

According to the most recent FCC figures, broadcasters have already been making 97 cents a year on every dollar of the net tangible assets they have invested, and yet they complain about a blanket music license fee of about 1 percent of their net revenues. I mention net. Down from 2½ percent in 1949.

The broadcasters prosper whether or not this legislation becomes law. Songwriters survive only if this legislation does not become law.

Thank you.

[Statement of Mr. David and additional material, subsequently submitted for the record, follow:]

PREPARED STATEMENT OF AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS (ASCAP)

S.1980 is unconscionable special interest legislation of no possible benefit to the public interest or the American music consuming public. As the Register of Copyrights testified last month in the House, there is no "glaring injustice" to be remedied here, no powerless group to be rescued, no unequal bargaining power to be balanced. There is an equilibrium now, he said, that this bill would upset; and the parties could privately negotiate a solution to any existing problems once the Congress makes clear that it will not intervene. Similarly, Thomas F. Smegal, Jr., President of the American Intellectual Property Law Association, denounced this bill as

"a highly negative precedent for all owners of intellectual property . . . [H]elp from Congress (in copyright compensation negotiations) can only be justified as an aid to the public . . . not used to increase the profitability of any industry."

S.1980, advocated solely by a small group of TV station owners who deprecate the importance of American music on television and are intent on increasing still further their enormous profitability at the expense of America's songwriters, would drastically alter the present free market system of negotiations and compensation that has for forty years successfully assured high quality music in high quantity to American television viewers by assuring reasonable economic incentives for those who create that music. It would not only chaotically disrupt the present system but destroy the reasonable expectations for compensation for their past and future compositions on which the creators of American music rely.

Not only would this bill destroy all or most of the income now earned by some 4,000 ASCAP composers and lyricists from the non-network telecasts of their music. It would

also destroy all or most of the hopes and opportunities of countless thousands of other ASCAP members -- many of them part-time songwriters, music teachers or weekend orchestra players -- whose dream of becoming one of those 4,000 would be crushed by a new system deliberately designed to reduce or prevent the payment to unknown composers of fair value for their hit songs on syndicated TV.

Congress's Constitutional Responsibility

Under the Constitution, Congress has a special responsibility to protect the integrity of copyright upon which our music and other creators depend for their livelihood. In fulfilling that mandate, the law since 1909 has recognized the important distinction between the "recording rights" to a musical composition, which are purchased in the case of syndicated television by the producer of a show who records and integrates that music into the show's soundtrack, and the "public performance rights" to that composition, which are purchased by the local TV stations who broadcast that syndicated show. The distinction assures the composer and his publisher under the copyright law of receiving not only payment for the initial synchronization of their work but continuous payment for the continuous performance of that work.

S.1980 would end this distinction and thus this assurance by requiring the TV producer to acquire all the rights to that composition simultaneously before he or anyone else knows whether or how often that music will be performed by local television. As the proponents of S.1980 have previously testified, they would expect, if it is enacted, that TV producers would make a single payment to the music copyright owners for both the recording or synchronization rights and the performance rights; that ASCAP and BMI would then no longer function with respect to local TV broadcasting (where they now monitor the number of times a copyrighted

work is performed and pay the copyright owners accordingly); and that local TV broadcasters would pay less for copyrighted music as a result.

It is impossible to imagine how the purpose of the Copyright Law -- to encourage authors to create for the ultimate benefit of the public -- can possibly be squared with a bill which mandates the merger of recording and performance rights, thereby in effect extinguishing the latter and shrinking existing copyright protection, to the substantial detriment of creators. The bill is, moreover, contrary to all U.S. and international copyright practice and, if enacted, would invite retaliation against U.S. music rights abroad. Congress in 1976, after two decades of study and hearings, emphasized in the new Copyright Revision Law the principle of full divisibility of rights as a means of assuring maximum incentives for those who create the cultural works of our nation. As the Register of Copyrights has pointed out, S.1980 would renege on that pledge and abridge that principle, abolishing for music copyright owners one of their most important rights and sources of income. There is no possible copyright basis for a law which will stifle the creation of musical works in order that broadcasters may further dominate the market in which syndicated programs are sold. This bill actually addresses the antitrust laws, not the copyright law; but it was not so framed because it is based on the allegedly anticompetitive nature of the blanket license that the courts have already held not to be anticompetitive. The broadcasters cannot directly ask for an antitrust remedy when there is no antitrust abuse that needs remedying. There is only the repeated lament, endlessly re-run, "We pay too much."

Alternative Methods of Licensing

At present, local TV stations can acquire these public performance rights, according to the Second Circuit

Court of Appeals (and a 1985 statement by Les Arries, Chairman of the All-Industry Television Music Licensing Committee), by negotiating with the music's creators or their representatives for any one of four different kinds of license.

(Buffalo Broadcasting Co. v. ASCAP and BMI, 744 F.2d 917 [2nd Cir. 1984], cert. denied, 105 Sup. Ct. 1181 [1985].)

(i) "Source licensing," under which the TV producer/syndicator acquires those rights along with the recording or synchronization rights and conveys them with the show to the TV station -- the one method of licensing that S.1980 would require, excluding the other three -- is available now, the Court found, to any broadcasters willing to pay for it. So long as the copyright proprietors are free to bargain for, and compare source licensing fees with, the other three forms of licensing, broadcasters would pay something for obtaining performance rights through a source license, and not merely pay the producer/syndicator an amount for all music rights no greater than the amount it now reimburses him for programs without performance licenses. But the broadcasters do not want to pay anything more for programs with music performance rights, and thus they seek through legislation to make any form of license other than source licensing unavailable to those who create music for syndicated TV.

When the broadcasters first started talking among themselves about source licensing back in 1961, their chief bargaining representative told them they would pay no more to syndicators for programs with performing rights than they were then paying for programs without those rights. Why? Because there were then and are today far more syndicated programs available than needed by the local stations; and those stations can thus generally determine the price they pay. That is why the proponents of S.1980 have asserted that broadcasters will pay less for TV music, not more, if the bill passes.

(ii) "Direct licensing" between the creators and the broadcasters, the Court also held, was available now to convey performance rights, if the broadcasters were willing to pay for it. But they are not willing to pay for it -- and will not be willing to pay the syndicators the cost of doing it for them through the source licensing mandated by this bill -- as indicated in their own "fact sheet" urging passage of S.1980. That broadcaster position paper rejects direct licensing as a desirable alternative because "the transaction costs of negotiating with individual composers for . . . each song render direct licensing very expensive."

The broadcasters are right. It would be expensive -- another indication that syndicated TV depends upon far more music, involving far more works by far more composers, than the broadcasters have acknowledged. Many of those works are songs written not specially for a new TV show but long before that show was produced -- songs like "As Time Goes By", "Over The Rainbow," "Chattanooga Choo Choo," "Putting on the Ritz," "Blue Moon," "We're in the Money," "My Blue Heaven," and "Sweet Georgia Brown." To purchase the performance rights to that pre-existing music through either source or direct licensing, the purchaser (whether broadcaster or producer) -- instead of easily and simultaneously concluding a deal for those rights with a publishing company when he acquires the synchronization rights -- must find and negotiate with each composer and lyricist (or his widow or estate). Publishers routinely license synchronization rights; but writers must be reached and must consent before performing rights can be licensed to producers or broadcasters.

The broadcasters have made clear that they do not want to assume that burden through direct licensing; the TV producers, on whom the burden will fall under source licensing, will similarly avoid that burden whenever possible, engaged as they are in a high-risk, deficit-financed, low-

success-ratio business; and that is another reason why S.1980, by requiring the use of source licensing for syndicated TV (and abolishing the blanket license, described below, that avoids this burden for everyone), will cause TV producers to prefer the use of public domain music or cheaper music or no music at all to the burden of clearing the rights for high quality, particularly pre-existing, music.

(iii) "Per program licensing," the Court further held, was also available to those broadcasters willing to pay for it, enabling them to obtain a license for a term of years, granting the same access to the entire repertory as the blanket license, in return for fees payable only for those programs actually using ASCAP or BMI music which had not been licensed either at the source or directly. The fee is negotiable, and under a long-standing consent decree ASCAP cannot refuse to grant such a license, cannot charge an unreasonable fee, and has the burden of proof in defending any fee that a broadcaster asserts to the court is unreasonable. Yet, despite those assurances about that alternative, the broadcasters have preferred to complain to Congress without foundation that they are required under present law to pay for music they do not use.

(iv) "Blanket Licensing" is the fourth alternative system found by the Court of Appeals to be available in today's music market, and that is the system that prevails today. For reasons of convenience, comfort and efficiency, avoiding the burdens of individual direct license negotiations described above, the broadcasters themselves long ago worked out with music creators a system of blanket licensing under which they pay a single reasonable fee for the right of access to all ASCAP or BMI music. With that fee and license, much like a library card, they purchase the convenience that accompanies the right of unlimited use of any and all ASCAP or BMI songs without further payments; and they purchase, as

Judge Winter noted in the Buffalo case, the comfort that accompanies a virtual indemnity against any infringement claim from any ASCAP or BMI composer.

For many decades bargaining on blanket licenses between ASCAP and various industry-wide committees have taken into account all of the points raised by sophisticated, well financed negotiators, including the amount and type of music that the purchasers have actually used and expect to use during the license term.

In well established industries -- local television, local radio, background music, hotels and motels -- negotiations have tended to be within narrow ranges with both sides focusing on changes since the last agreements were negotiated. The reasonableness of fees is guaranteed by a federal judge and the burden of proving reasonableness is on ASCAP. Thus, what really happens is that industry-wide fees are agreed on at a kind of lowest common denominator level which both sides agree is fair to virtually all users. In TV, this provides a spectacular bargain for those local stations that use more copyrighted music than most. Moreover, any broadcaster who can demonstrate that his use of music is so different from the rest of his industry that he is entitled to a lower rate may initiate his own proceeding, as KWTX-TV is doing right now.

Thus the smallest station in the country has the benefit of excellent and experienced representation by the powerful All-Industry Committee and its counsel. Before the Committee agreed to terms in the last negotiation, it circulated a draft of the proposed agreement to every station in the country and solicited comments from all. On the basis of those comments, further changes were negotiated before the agreement was submitted to the court for judicial approval. For nearly forty years agreements have been hammered out in this fashion. Now, suddenly, Congress is told that the

stations are helpless, hapless victims. The plain historical record offers no more support for their tale of woe than do their own extraordinary financial statements.

From its pool of local TV blanket license fees, ASCAP or BMI then pays each composer, lyric writer and publisher a portion of that pool on the basis of the relative number of times their works are broadcast and featured on non-network programs. It thus assures a composer of continuing royalties for continuing performance.

A blanket license, it is important to remember, is not obtained by a station to cover only the particular music actually performed on all or any one of its local programs. On the contrary, most, if not all, stations would find limited licenses of that kind, however obtained, more cumbersome to administer, far less risk-free regarding infringement lawsuits and ultimately far more expensive than the blanket license. If the fee were based on music use, the station would need to keep a record of its music uses and report them to ASCAP and BMI which, in turn, would have the expense of checking to be sure its music performed was properly reported and paid for. The blanket license, by having an agreed on fee that is not related to music use, avoids these record-keeping and checking costs.

The proponents of S.1980 have alleged that the blanket license made sense for TV only in the early years when it was primarily a live medium performing music that was not recorded or otherwise planned long in advance. In fact, even local television has always been more pre-recorded than live; and the blanket license has always been used to enable all parties to avoid the expense, burden and risk of trying to acquire through separate negotiations with each composer or his heirs the performance rights to each of the many millions of pieces of music now played each year by local TV stations.

For forty years this system of blanket licensing has worked smoothly. The President of the N.A.B. himself -- when advocating the same kind of blanket license system for cable television -- recently told a Congressional subcommittee that the blanket license system for broadcasting reflected "equality of bargaining positions." When ASCAP and the All Industry Committee representing the broadcasters reached a voluntary agreement on new blanket rates after the last bargaining round in 1969, the Committee proudly reported to the broadcasters that it had obtained "a substantial reduction . . . a major breakthrough." In 1973, the Committee recommended, and all broadcasters voluntarily agreed, that they keep that same rate agreement in force for another five years.

This system, which S.1980 would outlaw, encourages TV producers to use the music they think best for their programs, because -- inasmuch as they do not perform the music -- those producers are required to pay only minimal synchronization fees. Thousands of composers and publishers compete vigorously for the relatively few assignments available. Only the quality music that the producer feels will add to the success of his show wins out. The composer of good music that contributes to a good syndicated show that is repeatedly performed is compensated accordingly; and, contrary to broadcaster complaints that they are paying for mediocre music, the composer of unappealing music in an unappealing show that is never performed receives nothing.

Composers and publishers are happy to provide music to these syndicated programs today because, under the blanket license, they will receive additional performance rights payments as their music continues to be performed. The TV stations thus receive better programs and music and -- having once obtained a blanket license -- are not required to pay

any additional premiums on successful songs that are repeatedly performed.

Many local TV stations hire a local ASCAP member to compose and record a song or theme for a locally originated show (even though, as their spokesman noted in the House hearing last month, such local shows are all "talk: news, weather, sports," which generally use only the least expensive music). Those local TV stations pay that local songwriter nothing for the performance rights to those songs because the station's blanket performance right license already covers all songs, past, present and future, by all ASCAP members.

In short, neither the producer of syndicated shows nor the broadcaster has any incentive today, as they most definitely would under S.1980, to select and broadcast the cheapest low quality music; and those composers who write high quality, frequently performed music are assured, as they would not be under S.1980, of receiving more compensation for it, an incentive to create still more. Thus, everyone benefits, particularly the American public. For in this country, the test of "good" music is a market test -- repeat performance.

The Proposed Bill

S.1980 would eliminate that market test, and substitute a system that would require most composers to accept as full and final compensation a single payment made before the success of the music and program is known. It would force the composer to agree on payment for the public performance rights to a composition in a syndicated show long before it has even been performed -- before even the show's producer knows whether he can sell it and recover his costs. He does know that, if he pays anything for music beyond the minimal amount now paid for synchronization rights, he may have to swallow it. Even under the best of circumstances,

that payment will rarely be related to the success of the music in the marketplace. As the Register of Copyrights has pointed out, the argument by S.1980 proponents that composers, like unionized screenwriters, can insist on "residual payments . . . is not realistic . . . except for the most famous composers." The incentive for good music on TV will largely disappear.

The broadcasters, in seeking support for this bill, have repeated to Congress the same complaints they made to the courts about the blanket license:

-- that local TV broadcasters are being required without real negotiations to pay unreasonably high fees for blanket licenses;

-- that local TV broadcasters are subjected to abuses of monopolistic power from the performing rights organizations such as ASCAP;

-- that local TV broadcasters are being forced to accept blanket licenses, covering music they do not use, and are not allowed to seek source licensing or direct licensing limited to music they do use;

-- that local TV broadcasters realistically have no economically viable alternative to the blanket license system;

-- that local TV broadcasters have been repeatedly rebuffed in their good faith requests to syndicators to obtain source licenses; and

-- that local TV broadcasters are unable to obtain music performance rights from any one other than the performing rights organizations.

But every one of these allegations has been previously made to the courts and soundly rejected on full records as recently as 1984. Every one of these practices, if alleged anew in the future on the basis of new and different facts, could be pursued by the broadcasters in court without new legislation,

and, if proved, could be halted by the court without new legislation.

The broadcasters have also tried to find fault with the historic 50-50 division of blanket license royalties between composers and publishers, pointing out that many of these publishers are owned by the same Hollywood studios that produce and syndicate the television shows for which the music in question is written. But S.1980 contains no provisions to reduce the publisher's share of performance right royalties for music on syndicated television. On the contrary, it would -- by abolishing the blanket license -- eliminate the role of ASCAP, which today guarantees the composer of at least 50%, and substitute in its place as TV's payees the very entities these broadcasters are complaining about, the producers and syndicators, who would be free to pay publishers and composers for those performance rights on whatever terms they had the bargaining power to impose. In short, any Hollywood studio-owned publishers who, the broadcasters allege, do little now to earn their 50% share of the syndicated performance rights royalty will be in a far stronger position to receive more than 50% under S.1980, while the songwriter will no longer be assured of receiving at least 50%.

The very reason ASCAP was established by Victor Herbert, John Philip Sousa, Irving Berlin and other music giants in 1914 was to give copyright owners the ability to bargain meaningfully and to curb infringements effectively. Today, as it has for 72 years, ASCAP divides all blanket license royalties evenly between songwriter and publisher, recognizing that some publishers are owned by movie producers, some by broadcasters and some by the composers themselves, and that some publishers are required by their contracts with the composers to perform certain duties or to turn over a portion of their fees. ASCAP simply guarantees

that the composer receives continuing royalties reflecting the frequency with which his music is played on TV, and that he receives at least 50% of those royalties. S.1980 would eliminate both of those guarantees.

Movie theatres, as the proponents of S.1980 are fond of pointing out, are able to acquire all rights to a feature film without making a separate payment for music performance rights. Blanket licenses are prohibited, source licensing is required. But the fact that composers are economically penalized in one industry, as the result of a 1948 District Court antitrust decision, is no reason why they should be penalized in a different industry where a court-supervised consent decree guards against any uncompetitive practices. The TV broadcasters, to be sure, have claimed that they, too, have been subjected to antitrust violations by the ASCAP blanket license and they have gone to court to seek the same relief as the theatres; but the courts have found no such violations regarding TV music and have refused to so punish the composers.

Fortunately for those who compose music for feature films shown in theatres, their right to continual royalties for continual performance is still protected by blanket licenses whenever the films containing their music are shown on TV or shown abroad. Moreover, these two industries -- movie theatres and syndicated TV -- have long been governed by a separate set of legal and economic practices. Every feature film producer -- unlike his TV counterpart -- collects in fees or rentals a percentage of the gross covering every person watching his work. That film producer is thus more likely to start production with a large budget capable of paying substantial up-front money to the composer. (Feature film producers, it should also be noted, have months if not years of lead-time to clear all music rights; TV producers often have only days or even hours.)

What This Bill is All About: Money

The bill's supporters and opponents both agree on its bottom line effect: a net transfer of funds from music creators to local TV station owners (who claim they will use those funds for more public affairs shows, although their advertising revenues in the last ten years rose from \$2.9 billion to \$12 billion with no increase in public affairs programming). The TV station owners' greed is astonishing when one considers that the effective rate of ASCAP's blanket licenses, negotiated under court supervision, has already declined over the past four decades to little more than a penny out of every dollar of net (nor gross) television station revenue, specifically 1.15% today compared to 2.5% in 1949.

Out of whose pockets will this broadcaster bonanza come? It has been estimated that the average professional composer earns only \$5,000 to \$7,500 a year from writing music, and that less than a third of composer royalties come from the licensing of TV performance rights; but nothing is paid under a blanket license for poor music that never gets on the air -- so the money gained by the broadcasters will not be coming, as they allege, from paying less to "mediocre" composers. But those who create the great music repeatedly performed on TV will often be required, under S.1980, to accept a fixed payment before that music's value can be known -- so most of the money going to the broadcasters under this bill would be coming from our best songwriters. In the words of the Register of Copyrights: "The source licensing legislation will take away the royalties paid composers through the blanket licensing system without guaranteeing them any other royalties." (No wonder the broadcasters had difficulty in finding a recognized songwriter willing to testify for them on this bill!)

Bear in mind, in hearing broadcaster complaints about blanket licenses costing all of 1.15% of net revenues, that the average local station owner, according to the FCC, has for decades enjoyed annual pre-tax profits of 25% to 30% of revenues, or 97¢ a year on every dollar of net tangible assets invested; that three-fourths of the approximately 800 local television stations are owned by 160 media conglomerates operating 2 to 12 stations each; and that local television stations, in the words of the December 18, 1985 New York Times, have become "hot commodities" because of their "considerable profits . . . large cash flows . . . minimal capital requirements and . . . minimal competition." In 1980, locally-owned television stations enjoyed adjusted gross billings of nearly \$4.3 billion and paid blanket license fees of less than \$37 million -- and since then their billings have doubled while our music license fees rose less than 60%.

CONCLUSION

Under the proposed legislation, the individual composer writing music for syndicated television

- would no longer have four or more alternative means of licensing the performing rights to his music, only one;

- would no longer have ASCAP or BMI monitoring the number of times his music is played on local TV;

- would no longer be assured of royalties reflecting the frequency with which his music is performed;

- would no longer be assured of receiving at least 50% of those royalties;

- would no longer be assured, particularly if he were a newcomer, of receiving more royalties for the music he contributes to a hit show than a famous composer would receive for a flop;

-- would be required to bargain as an individual with a TV producer who will, if this bill becomes law, have every incentive to reduce his expenditures for copyrighted music;

-- would be required to settle with that producer on a fee for his music before either of them knows its true value, i.e., its acceptability in the marketplace; and

-- would no longer receive the separate payment for separate rights (specifically, for the performance right as distinguished from the recording right) that lies at the heart of true copyright protection.

The American public

-- would be subjected to a needless and chaotic change in the system that for 40 years has successfully provided music for their favorite syndicated TV shows;

-- would find the present free competitive TV music market system of bargaining and choice replaced by a federal statute straitjacketing negotiations by mandating one licensing method only -- "government regulation par excellence," as the Register of Copyrights has observed;

-- would find the blanket license system, which encourages TV producers to use quantities of quality music at no extra cost for performing rights, outlawed in favor of a new system in which TV producers, forced to assume the burden of acquiring those rights, would be under constant economic pressure to reduce the amount and quality of copyrighted music used on syndicated TV;

-- would witness a step backward in the legislative protection of copyrights and their separate and divisible rights, protection that is constitutionally mandated in the interests of the American public at large; and

-- would receive no benefit from a law enabling the

\$12 billion local broadcast industry to stop paying music copyright owners less than 1% of that amount.

Everyone has done well under the present music copyright system that has been in effect for forty years -- the television station owners have prospered, the composers, publishers and TV producers like the blanket license, the courts are satisfied that competition prevails, the TV public and music lovers are not complaining -- what is the urgent need to change? There is no urgent need, no public interest to be served, no increase in copyright protection to be gained, no additional incentives to the creation of good music to be offered -- only a group of local TV broadcasters seeking not a fair bargain but a free ride, hoping to obtain valuable music performance rights by paying little or nothing more to the syndicators than they now pay, and paying zero to the creators and owners of the music.

That is outrageous. The broadcasting of American copyrighted music has helped make these local television station owners rich. They depend on that music in their syndicated programs; they perform it; they attract audiences for their stations and advertisers with it; it is unthinkable that they would be permitted to get away without paying for it.

Proponents of this legislation have not stopped to consider its disruptive effects on long-term contracts between producers and broadcasters, on the hopes and expectations of American composers, and on the attitudes of foreign copyright proprietors and their governments. This is nothing more nor less than special interest legislation designed to enrich local TV broadcasters at the expense of America's composers and other music copyright proprietors -- legislation that can only diminish both the quantity and the quality of music in our society.

This bill should be swiftly and soundly defeated, and the broadcasters encouraged to join us in court or at the bargaining table, whichever they prefer. At the bargaining table, they will find us reasonable in proposing a rate, as the law requires us to be; flexible in considering new or alternative methods of calculating that rate, as we have every intention to be; and accommodating in taking into consideration whatever demonstrable developments and differences in the broadcasting industry they may raise, as we have every wish to be. We have no doubt that, as in the past, a harmonious settlement on performance right fees can and will be concluded as soon as the broadcasters realize that neither the courts nor the Congress will enable them to obtain these rights for nothing.

LOCAL STATION BLANKET TELEVISION LICENSE

Agreement made between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS
(herein referred to as "SOCIETY") and

(herein referred to as "LICENSEE") as follows:

1. A. SOCIETY grants to LICENSEE and LICENSEE accepts for a period commencing as of
and ending December 31, 1961, a license to perform publicly by television
broadcasting on LICENSEE'S local television programs from Television Station
located at

(herein referred to as "the Station") non-dramatic performances of the separate musical compositions heretofore copyrighted, composed or written by those members of SOCIETY listed in Schedule "A" attached hereto (as the same may be augmented from time to time) and now or hereafter during the term hereof in the repertory of SOCIETY, or hereafter during the term hereof copyrighted, composed or written by such members of SOCIETY, or of which SOCIETY shall have the right to license such performing rights. As additional members of SOCIETY hereafter grant to SOCIETY the right to license performances by means of television broadcasting, such additional members will be added to those listed in Schedule "A" as of the date upon which SOCIETY acquires such rights.

B. This license does not extend to or include the public performance by television broadcasting or otherwise of any rendition or performance of (a) any opera, operetta, musical comedy, play or like production, as such, in whole or in part, or (b) any composition from any opera, operetta, musical comedy, play or like production (whether or not such opera, operetta, musical comedy, play or like production was presented on the stage or in motion picture form) in a manner which recreates the performance of such composition with substantially such distinctive scenery or costume as was used in the presentation of such opera, operetta, musical comedy, play or like production (whether or not such opera, operetta, musical comedy, play or like production was presented on the stage or in motion picture form); provided, however, that the rights granted to LICENSEE under this agreement shall be deemed to include a grant of the right to make non-dramatic performances of compositions licensed hereunder by the television broadcasting of a motion picture containing such compositions if the rights in such motion picture other than those licensed under this agreement have been obtained from the parties in interest.

Nothing herein contained shall be deemed to license the public performance by television broadcasting of dramatic performances. Any performance of a separate musical composition which is not a dramatic performance, as defined herein, shall be deemed to be a non-dramatic performance. For the purposes of this agreement, a dramatic performance shall mean a performance of a musical composition on a television program in which there is a definite plot depicted by action and where the performance of the musical composition is woven into and carries forward the plot and its accompanying action. The use of dialogue to establish a mere program format or the use of any non-dramatic device merely to introduce a performance of a composition shall not be deemed to make such performance dramatic.

The definition of the terms "dramatic" and "non-dramatic" performances contained in this Sub-paragraph "B" are purely for the purposes of this agreement and for the term thereof and shall not be binding upon or prejudicial to any position taken by either of the parties subsequent to the expiration thereof or for any purpose other than this agreement.

C. Except as expressly herein otherwise provided, nothing herein contained shall be construed as authorizing LICENSEE to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions licensed hereunder or as authorizing any receiver of any television broadcast to perform publicly or reproduce the same for profit, by any means, method or process whatsoever.

2. A. "Local television program" as used in this agreement shall be deemed to mean a program, whether or not such program shall include visual material, broadcast from the Station other than a network television program. The performances licensed hereunder may originate at the Station or at any other place whether or not such other place is licensed to perform publicly for profit the compositions licensed hereunder, regardless of the manner, means, or method of such origination; but nothing herein contained shall be deemed to grant a license to such place itself (or to the parties responsible for the performance therein) for the public performance for profit in such place of any such compositions.

B. "Network television program" as used in this agreement shall be deemed to mean a program, whether or not such program shall include visual material, broadcast simultaneously or by so-called "delayed" or "repeat" broadcasts (sometimes known as "rebroadcasts") over two or more affiliated stations.

C. "Affiliated station" as used in this agreement shall be deemed to mean any television broadcasting station in the United States which regularly broadcasts network television programs of a television network or which appears on the television rate cards of such network and which (a) is interconnected with such network by co-axial cable, wire, television relay or any other means whatsoever, or (b) pending the availability of such means of interconnecting the station with such network at an expenditure which is not unreasonable in comparison with the cost of interconnecting such network's other affiliated stations, is a party to a non-interconnected affiliation agreement with such network. Such station shall only be deemed to be an affiliated station so long as it regularly broadcasts such programs or appears on such rate cards, as the case may be. All television broadcasting stations in the United States which are owned and operated by a network and which broadcast such network's television programs shall be deemed to be affiliated stations for the purposes of this agreement, whether or not they appear on such network's television rate cards.

3. A. LICENSEE agrees to furnish to SOCIETY upon request during the term of this agreement a list of all musical compositions (or, at the option of LICENSEE, a list of all musical compositions licensed hereunder) broadcast from or through the Station on LICENSEE'S local television programs, showing the title of each composition and the composer and author thereof, and a brief notation of the scenery and costumes used, provided that LICENSEE shall not be obligated under this paragraph to furnish such a list covering a period or periods in the aggregate in excess of three months during any one calendar year.

B. At the request of SOCIETY, LICENSEE will furnish to SOCIETY the dialogue, if any, used in specified programs. SOCIETY will only ask for dialogue where it is reasonably necessary for its purposes. In cases where dialogue is only available in recorded form it will be sufficient for LICENSEE to permit SOCIETY to screen the recording. When the dialogue is available in written form in any of the cities where SOCIETY has an office and it is inconvenient for LICENSEE to make an additional copy, it will be sufficient if LICENSEE permits a representative of SOCIETY to examine the file copy of the dialogue at LICENSEE'S office. LICENSEE will have no obligation to furnish SOCIETY with dialogue in cases where it does not have within its control either a written or recorded version of the dialogue.

C. With respect to motion pictures broadcast from or through the Station on LICENSEE'S local television programs, LICENSEE'S obligations under Sub-paragraphs "A" and "B" of this Paragraph "3" shall be deemed to have been complied with if LICENSEE shall identify the picture for SOCIETY by its title, the name

of the producer where available, and the copyright notice contained therein where available. If SOCIETY does not have a music cue sheet for such picture, and LICENSEE does have such a sheet, LICENSEE shall make such music cue sheet available to SOCIETY for examination at SOCIETY'S request and SOCIETY shall return such sheet to LICENSEE promptly.

D. The provisions of Sub-paragraphs "B" and "C" of this Paragraph "3" shall not limit LICENSEE'S obligation to cooperate with SOCIETY in connection with any claim, demand or action referred to in Sub-paragraph "D A" of this agreement.

4. A. The members of SOCIETY shall have the right, at any time and from time to time, in good faith, to restrict the television broadcasting of compositions from musical comedies, operas, operettas and motion pictures, or any other composition being excessively broadcast, only for the purpose of preventing harmful effect upon such musical comedies, operas, operettas, motion pictures or compositions, in respect of other interests under the copyrights thereof; provided, however, that the maximum number of compositions which may be at any time thus restricted shall not exceed 750 and moreover that limited licenses will be granted upon application to SOCIETY entirely free of additional charge as to restricted compositions, if and when the copyright owners thereof are unable to show reasonable hazards to their major interests likely to result from such television broadcasting; and provided further that such right to restrict any such composition shall not be exercised for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition; and provided further that in no case shall any charges, "free plugs", or other consideration be required in respect of any permission granted to perform a restricted composition; and provided further that in no event shall any composition, after the initial television broadcast thereof, be restricted for the purpose of confining further television broadcasts thereof to a particular artist, station, network or program.

B. SOCIETY reserves the further right, at any time and from time to time, in good faith, to restrict the television broadcasting of any compositions, over and above the number specified in the previous paragraph, only as to which any suit has been brought or threatened on a claim that such composition infringes a composition not contained in the repertory of SOCIETY or on a claim by a non-member of SOCIETY or by a member not listed in Schedule "A", as the same may be augmented from time to time, that SOCIETY does not have the right to license the public performance of such composition by television broadcasting.

5. A. In consideration of the license herein granted, LICENSEE agrees to pay to SOCIETY the following:

a. **SUSTAINING FEE:** For each calendar month during each contract year of the term hereof, the highest quarter-hour card rate of the Station for a single quarter-hour of television broadcasting.

If such highest quarter-hour card rate changes during any month, the monthly sustaining fee of the Station shall be pro-rated accordingly.

b. **COMMERCIAL FEE:** In addition, a sum equal to 2.05% of its "net receipts from sponsors after deductions".

B. The term "net receipts from sponsors" as used in this agreement shall be deemed to mean the gross amount paid for the use of television broadcasting facilities of the Station for LICENSEE'S local television programs, as defined herein, less any advertising agency commission not to exceed 15% actually allowed to a recognized advertising agency not owned or controlled by LICENSEE.

C. The term "net receipts from sponsors after deductions" as used in this agreement shall be deemed to mean net receipts from sponsors, less a sales commission on the net receipts from sponsors equal to 15% of such net receipts.

D. The term "gross amount paid for the use of television broadcasting facilities of the Station for LICENSEE'S local television programs" as used in this agreement shall be deemed to mean all payments made (whether in money or in any other form) by or on behalf of the sponsor of each program for the use of the television broadcasting facilities of the Station for all such local television programs, after deducting only rate card discounts, quantity and/or frequency, actually allowed, and whether such payment shall have been made directly to LICENSEE or to any other persons, firms or corporations. Where merchandise, services or any thing of service of value is received in lieu of cash consideration for the use of the television broadcasting facilities of the Station, the same shall be described and the reasonable value thereof determined and accounting made to SOCIETY upon the same basis as if a regular billing had been made by LICENSEE therefor in a sum equal to such reasonable value which in no event shall be deemed to exceed LICENSEE'S prevailing published card rate for such television broadcasting facilities.

E. No payment shall be required hereunder with respect to bona fide charges for the use of facilities furnished by LICENSEE to sponsors other than for time on the air, as such, provided:

a. that such charges are itemized separately when billed to the sponsors or their advertising agencies; and

b. that such charges are in addition to LICENSEE'S published applicable card rate (less applicable rate card discounts, quantity and/or frequency, actually allowed) for the use of LICENSEE'S television broadcasting facilities (i. e., time on the air) for the actual broadcast.

For the purpose of this Sub-paragraph "5 E", there shall be included in the term "LICENSEE'S published applicable card rate (less applicable rate card discounts, quantity and/or frequency, actually allowed)" for the use of LICENSEE'S television broadcasting facilities (i. e., time on the air) for the actual broadcast" charges for facilities normally required at LICENSEE'S station as a bona fide minimum for the television broadcast of a live studio program or a film program, as the case may be, excluding bona fide charges for rehearsal provided that they comply with the requirements of Sub-divisions "a" and "b" of this Sub-paragraph "5 E".

F. Co-operative programs are programs which are furnished by a network to its affiliated stations under an arrangement permitting an affiliate to broadcast such programs on a sustaining basis or on a commercial basis under the sponsorship of a local, regional or national advertiser contracting directly with such affiliated station or its representative for the incorporation of the commercial credits of such advertiser into the program as broadcast by such affiliated station. For the purposes of this agreement only, and without prejudice to the position of SOCIETY or LICENSEE or any network of which LICENSEE is an affiliated station as to the status of co-operative programs under SOCIETY'S non-visual broadcasting licenses, such co-operative television programs shall be deemed to be "network television programs" as defined herein.

G. No payment shall be required hereunder with respect to any sums received from political local television programs of LICENSEE.

H. No payment shall be required hereunder with respect to a local commercial television program of LICENSEE presented by motion picture or by transcription if a license has been granted by SOCIETY (as distinguished from its members) at the source to perform on such local commercial television program by means of such motion picture or such transcription, as the case may be, the musical compositions embodied therein.

I. If any local television program of LICENSEE produced solely for broadcasting purposes is presented in a studio, auditorium or hall where an audience is admitted free of charge, or where the entire admittance charge is paid to an eleemosynary institution which shall request a gratuitous license from SOCIETY, no additional royalties or fees shall be charged by reason of the presence of such audience.

6. A. As to SUSTAINING FEE, LICENSEE shall on the twentieth day of each month during the term hereof pay to SOCIETY the monthly sustaining fee payable hereunder and such payments shall be accompanied by statements setting forth the basis upon which the computation is made.

B. As to COMMERCIAL FEE, LICENSEE shall render monthly statements to SOCIETY on or before the twentieth day of each month covering the period of the preceding calendar month, on forms supplied gratis by SOCIETY, with respect to all gross amounts paid for the use of television broadcasting facilities for LICENSEE'S local television programs, and also showing all deductions in order to arrive at "net receipts from sponsors" and "net receipts from sponsors after deductions" as herein provided, without exception, and the percentage thereof payable to SOCIETY, which statements shall be accompanied by remittance due SOCIETY under the terms hereof.

C. Accountings and payments shall be made on a billing basis, with the right of deduction or rebate for bad accounts or discounts allowed or rebates made subsequent to the termination of this agreement with respect to local television broadcasts made during the term hereof shall be accounted for by LICENSEE as and when such billings are made by LICENSEE.

7. SOCIETY shall have the right, by its duly authorized representatives, at any time during customary business hours, to examine the books and records of account of LICENSEE only to such extent as may be necessary to verify (a) any statement of accounting required pursuant hereto, and (b) any statement of accounting to SOCIETY required of LICENSEE in connection with co-operative television programs made available to LICENSEE by such network. SOCIETY shall consider all data and information coming to its attention as a result of any such examination of books and records as completely and entirely confidential.

8. Upon any breach or default by LICENSEE of any terms herein contained relating to the reports, accountings or payments required to be made by LICENSEE, SOCIETY may give LICENSEE thirty (30) days' notice in writing to cure such breach or default, and in the event that such breach or default has not been cured within said thirty (30) days, SOCIETY may then promptly terminate this license.

9. A. SOCIETY agrees to indemnify, save and hold LICENSEE, its sponsors and their advertising agencies, its and their artists, and each of them harmless, and defend LICENSEE, its sponsors and their advertising agencies, its and their artists, and each of them from and against any claim, demand or suit that may be made or brought against them or any of them with respect to performances given on LICENSEE's local television programs during the term hereof in accordance with this license of (a) "cleared compositions", or (b) musical compositions heretofore copyrighted, composed or written by members of SOCIETY listed in Schedule "A" as augmented from time to time and now or hereafter during the term hereof in the repertory of SOCIETY, or (c) musical compositions hereafter during the term hereof copyrighted, composed or written by such members of SOCIETY, or (d) musical compositions which SOCIETY shall hereafter certify in writing to LICENSEE as musical compositions copyrighted, composed or written by such members of SOCIETY and included in SOCIETY'S repertory for the purposes of this agreement, or (e) musical compositions "deemed to be included in the repertory of SOCIETY" in accordance with the provisions of Sub-paragraph "C" of this Paragraph "9". In the event of the service upon LICENSEE of any notice, process, paper or pleading under which a claim, demand or action is made or begun against LICENSEE on account of any such matter as is hereinabove referred to, LICENSEE shall promptly give SOCIETY written notice thereof and simultaneously therewith deliver to SOCIETY any such notice, process, paper or pleading, or a copy thereof, and SOCIETY at its own expense shall have sole charge of the defense of any such action or proceeding. LICENSEE, however, shall have the right to engage counsel of its own, at its own expense, who may participate in the defense of any such action or proceeding and with whom counsel for SOCIETY shall cooperate. LICENSEE shall cooperate with SOCIETY in every way in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein, and shall execute all pleadings, bonds or other instruments, but at the sole expense of SOCIETY, that may be required in order properly to defend and resist any such action or proceeding, and prosecute any appeals taken therein. In the event of the service upon LICENSEE of any notice, process, paper or pleading under which a claim, demand or action is made or begun against LICENSEE on account of the performance on LICENSEE'S local television programs of any musical composition (other than a "cleared composition") contained in the repertory of SOCIETY but not heretofore or hereafter during the term hereof copyrighted, composed or written by members of SOCIETY and not certified by SOCIETY as a musical composition copyrighted, composed or written by members of SOCIETY, SOCIETY agrees at the request of LICENSEE to cooperate with and assist LICENSEE in the defense of any such action or proceeding, and in any appeals that LICENSEE may elect to take from any judgments or orders entered therein.

B. As used in this Paragraph "9", a "cleared composition" shall mean any composition in the repertory of SOCIETY, not copyrighted, composed or written by a member of SOCIETY, which SOCIETY shall have notified LICENSEE is a composition with respect to which SOCIETY is willing to indemnify LICENSEE, provided that the performance of such composition shall be made on the specific local television program of LICENSEE for which a clearance shall have been given by SOCIETY; provided further, however, that in the event that SOCIETY notifies LICENSEE in writing that it is willing to clear such a composition without limitation to a specific program, such composition shall thereafter be regarded as a "cleared composition" until such time as SOCIETY shall rescind such clearance.

C. For the purpose of this Paragraph "9" only, any musical composition (other than a musical composition or group of musical compositions expressly excepted therefrom or that may be restricted because of the operation of Paragraph "4" hereof) which is listed in

(a) the perforated sheets known as the "ASCAP Index" previously furnished by SOCIETY to LICENSEE, or

(b) the bound volume entitled "ASCAP Index 1952", or

(c) the bound volume entitled "ASCAP Supplement Index 1954",

as the same may have been revised heretofore or as the same may hereafter be revised, as a musical composition heretofore copyrighted by a present member of SOCIETY listed in Schedule "A" as such list of present members may be augmented from time to time shall be deemed to be included in the repertory of SOCIETY. SOCIETY shall have the right to make reasonable revisions in such indices from time to time, provided, however, that no such revision and no exception referred to above shall be effective as to any broadcast of LICENSEE'S local programs aside, or delayed or repeat broadcasts thereof scheduled, prior to the date on which LICENSEE shall have received notice of such revision or exception. Nothing in this Sub-paragraph "C" shall be deemed to limit LICENSEE'S rights or to limit or affect LICENSEE'S obligations to pay the license fees payable under this agreement or to limit SOCIETY'S obligations to indemnify as provided in Sub-paragraph "A" of this Paragraph "9".

D. The provisions contained in Paragraph "9" shall apply to LICENSEE'S sponsors and their advertising agencies, and its or their artists, as to LICENSEE'S local television programs with the same effect as if in each instance there had been added to "LICENSEE" the words "its sponsors and their advertising agencies, its and their artists, and each of them".

10. SOCIETY agrees during the term hereof to maintain for the service of LICENSEE substantially SOCIETY'S present repertory of compositions copyrighted, composed or written by present members of SOCIETY listed in Schedule "A" as such list of present members may be augmented from time to time. In case there shall be a substantial diminution, by reason of action by SOCIETY or any such members, in the use which LICENSEE may make of compositions copyrighted, composed or written by such members of SOCIETY as compared to the use which LICENSEE customarily has been permitted to make of such compositions prior to the actual execution of this agreement or in case there shall be a substantial diminution in SOCIETY'S present repertory of compositions copyrighted, composed or written by present members of SOCIETY listed in Schedule "A" as such list of present members may be augmented from time to time, LICENSEE may give SOCIETY thirty (30) days' notice in writing to cure such substantial diminution. In the event that such substantial diminution in use or repertory has not been cured within said thirty (30) days, LICENSEE may then promptly terminate this agreement. If LICENSEE does not so terminate, LICENSEE shall have the right to obtain a reduction, as hereinafter provided, in the percentage payable on its "net receipts from sponsors after deductions" proportionate to such substantial diminution in use or repertory.

In the event that (a) such a substantial diminution in use or repertory shall have occurred and LICENSEE shall have notified SOCIETY thereof, and (b) SOCIETY shall not have cured such diminution within thirty (30) days thereafter, and (c) SOCIETY and LICENSEE shall be unable to agree within such thirty (30) days either as to the existence of such a diminution as would justify a decrease in the license fees payable hereunder or as to the appropriate reduction in the percentage payable on LICENSEE'S "net receipts from sponsors after deductions" by reason of such diminution, and (d) LICENSEE shall not have terminated this agreement as herein provided, the controversy shall be determined by arbitration as herein provided.

In the event that such a substantial diminution in use or repertory shall have been determined to exist as herein provided and thereafter SOCIETY shall have cured such diminution, SOCIETY shall have the right to obtain, as herein provided, the restoration of any reduction theretofore made in the license fees payable under this agreement by reason of such diminution. In the event that SOCIETY shall notify LICENSEE that in SOCIETY'S opinion any substantial diminution in use or repertory shall have been cured and within thirty (30) days thereafter SOCIETY and LICENSEE shall be unable to agree as to whether or not such diminution shall have been cured, the controversy shall be determined by arbitration as herein provided.

Any award of the arbitrators with respect to any controversy submitted to arbitration under this Paragraph "10" and reducing or restoring the percentage payable by LICENSEE hereunder shall be effective as of whichever shall be the later of (a) the date on which LICENSEE or SOCIETY, as the case may be, shall have given the other notice of such substantial diminution in use or repertory or the curing thereof, or (b) the date, if any, which the arbitrators shall specify as the date on which such diminution occurred or was cured.

In case any controversy is to be determined by arbitration as provided above, such arbitration shall be conducted under and pursuant to the laws of the State of New York, in accordance with the provisions of Paragraph "11" hereof.

In case the arbitrators shall determine that there has been such a substantial diminution in use or repertory and shall make an award reducing the percentage payable by LICENSEE on its "net receipts from sponsors after deductions", the reduction in such percentage payable by LICENSEE made by such award shall in no event be greater than the participation in such percentage payments of the publisher member or members of SOCIETY whose catalogue or catalogues shall have been the subject of such substantial diminution in use or repertory. The participation of such publisher member or members in such percentage payments made by LICENSEE hereunder shall be deemed to be the same percentage of such payments by LICENSEE as the percentage which such publisher member's or members' income from SOCIETY in respect of television distribution for the year immediately preceding shall bear to the entire distribution of royalties in respect of television by SOCIETY to all of its publisher members during such year.

11. In the event that during the term of this agreement there is to be determined by arbitration hereunder whether there has been such a substantial diminution in use or repertory and, if so, the percentage by which the license fees payable hereunder shall be reduced by reason thereof, or whether a substantial diminution has been cured, as the case may be, as provided in Paragraph "10", each party shall on written notice to the other appoint an arbitrator within two (2) weeks after the expiration of the applicable thirty (30) day period specified in Paragraph "10" hereof.

In the event that within ten (10) days after the giving of such notice by one party, the other shall not by written notice appoint another arbitrator, then upon the written request of either party (or both) the person who is at the time performing the functions of President of the American Arbitration Association shall appoint the second arbitrator. When two arbitrators have been appointed they shall, if possible, agree upon a third arbitrator and shall appoint him by notice in writing, in triplicate, signed by both of them, one of which triplicate notices shall be given to each party hereto. If ten (10) days shall elapse after the appointment of the second arbitrator without notice of the appointment of the third arbitrator having been given, then upon the written request of either party (or both) the person who is at the time performing the functions of President of the American Arbitration Association shall appoint the third arbitrator. Upon appointment of the third arbitrator the three arbitrators shall hold a hearing and give opportunity to each party hereto to present his case in the presence of the other, and shall then make their award determining the license fees which shall be paid by LICENSEE to SOCIETY, taking into consideration all applicable factors which tend to determine whether there has been such a substantial diminution and, if so, the extent thereof and the percentage by which the license fees payable hereunder shall be reduced by reason thereof, or whether a substantial diminution has been cured, as the case may be, as provided in Paragraph "10". The arbitration shall be conducted in accordance with the rules of the American Arbitration Association then in effect.

The award of the majority of the arbitrators shall be binding upon the parties hereto, judgment may be entered thereon in any court having jurisdiction, and this agreement shall be deemed to be modified accordingly. Such award shall include the fixing of the expenses of the arbitration, which shall be borne equally by both parties.

12. In the event of the termination or suspension of the governmental licenses covering the Station or any substantial alteration or variation of the terms and conditions thereof, or any major interference with the operations of the Station due to governmental measures or restrictions, LICENSEE shall have the right to terminate this agreement upon seven (7) days' notice.

13. All notices required or permitted to be given by either of the parties to the other hereunder shall be duly and properly given if mailed to such other party by registered United States mail addressed to such other party at its main office for the transaction of business.

14. This agreement shall endure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns, but no assignment shall relieve the parties hereto of their respective obligations hereunder as to performances broadcast, acts done and obligations incurred prior to the effective date of the assignment.

IN WITNESS WHEREOF, this agreement has been duly executed by SOCIETY and LICENSEE this
day of _____, 19____, as of the day of _____, 19____.



AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

By _____

LICENSEE

By _____

AMERICAN SOCIETY OF
COMPOSERS, AUTHORS AND PUBLISHERS



LOCAL STATION BLANKET TELEVISION LICENSE AGREEMENT

Licensee: _____

Station: _____

Location: _____

AGREEMENT made between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (herein referred to as "SOCIETY") and
 (herein referred to
 as "LICENSEE") as follows:

1A. SOCIETY grants to LICENSEE and LICENSEE accepts for a period commencing as of January 1, 1968 and ending December 31, 1973, a license to perform publicly by television broadcasting on LICENSEE's local television programs from television station located at (herein referred to as "the station") non-dramatic performances of the separate musical compositions heretofore copyrighted, composed or written by those members of SOCIETY listed in Schedule A attached hereto (as the same may be augmented from time to time) and now or hereafter during the term hereof in the repertory of SOCIETY, or hereafter during the term hereof copyrighted, composed or written by such members of SOCIETY, or of which SOCIETY shall have the right to license such performing rights. As additional members of SOCIETY hereafter grant to SOCIETY the right to license performances by means of television broadcasting, such additional members will be added to those listed in Schedule A as of the date upon which SOCIETY acquires such rights.

B. This license does not extend to or include the public performance by television broadcasting or otherwise of any rendition or performance of (a) any opera, operetta, musical comedy, play or like production, as such, in whole or in part, or (b) any composition from any opera, operetta, musical comedy, play or like production (whether or not such opera, operetta, musical comedy, play or like production was presented on the stage or in motion picture form) in a manner which recreates the performance of such composition with substantially such distinctive scenery or costume as was used in the presentation of such opera, operetta, musical comedy, play or like production (whether or not such opera, operetta, musical comedy, play or like production was presented on the stage or in motion picture form); provided, however, that the rights granted to LICENSEE under this agreement shall be deemed to include a grant of the right to make non-dramatic performances of compositions licensed hereunder by the television broadcasting of a motion picture containing such composi-

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tions if the rights in such motion picture other than those licensed under this agreement have been obtained from the parties in interest.

Nothing herein contained shall be deemed to license the public performance by television broadcasting of dramatic performances. Any performance of a separate musical composition which is not a dramatic performance, as defined herein, shall be deemed to be a non-dramatic performance. For the purposes of this agreement, a dramatic performance shall mean a performance of a musical composition on a television program in which there is a definite plot depicted by action and where the performance of the musical composition is woven into and carries forward the plot and its accompanying action. The use of dialogue to establish a mere program format or the use of any non-dramatic device merely to introduce a performance of a composition shall not be deemed to make such performance dramatic.

The definition of the terms "dramatic" and "non-dramatic" performances contained in this subparagraph B are purely for the purposes of this agreement and for the term thereof and shall not be binding upon or prejudicial to any position taken by either of the parties subsequent to the expiration thereof or for any purpose other than this agreement.

C. Except as expressly herein otherwise provided, nothing herein contained shall be construed as authorizing LICENSEE to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions licensed hereunder or as authorizing any receiver of any television broadcast to perform publicly or reproduce the same for profit, by any means, method or process whatsoever.

2A. "Local television program" as used in this agreement shall be deemed to mean a program, whether or not such program shall include visual material, broadcast from the station other than a network television program of a "regular national television network", as defined herein, or of an "occasional television network" licensed by SOCIETY (as distinguished from its members) at the source. The performances licensed hereunder may originate at the station or at any other place whether or not such other place is licensed to perform publicly for profit the compositions licensed hereunder, regardless of the manner, means, or method of such origination; but nothing herein contained shall be deemed to grant a license to such place itself (or

to the parties responsible for the performance therein) for the public performance for profit in such place of any such compositions.

B. "Network television program" as used in this agreement shall be deemed to mean a program, whether or not such program shall include visual material, broadcast simultaneously or by so-called "delayed" or "repeat" broadcasts (sometimes known as "rebroadcasts") over two or more affiliated stations.

C. "Affiliated station" as used in this agreement shall be deemed to mean any television broadcasting station in the United States which regularly broadcasts network television programs of a television network or which appears on the television rate cards of such network and which (a) is interconnected with such network by co-axial cable, wire, television relay or any other means whatsoever, or (b) pending the availability of such means of interconnecting the station with such network at an expenditure which is not unreasonable in comparison with the cost of interconnecting such network's other affiliated stations, is a party to a non-interconnected affiliation agreement with such network. Such station shall only be deemed to be an affiliated station so long as it regularly broadcasts such programs or appears on such rate cards, as the case may be. All television broadcasting stations in the United States which are owned and operated by a network and which broadcast such network's television programs shall be deemed to be affiliated stations for the purposes of this agreement, whether or not they appear on such network's television rate cards.

D. "Independent station" as used in this agreement shall be deemed to mean any television broadcasting station in the United States other than an affiliated station of a "regular national television network" as defined herein.

E. "Regular national television network" as used in this agreement shall be deemed to mean any television network which (a) has a minimum of one hundred affiliated stations and (b) supplies its affiliated stations with television programs which are broadcast by such affiliated stations on a regular basis for an average of not less than forty hours each week in any six month period during the term of this agreement.

F. "Occasional television network" as used in this agreement shall be deemed to mean any group of two or more affiliated stations which is not a regular national television network as defined herein, provided, however, that a group of two or more affiliated stations all

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or substantially all of which are under common ownership or control shall not be considered to be an occasional television network.

G. "Video tapes" as used in this agreement shall be deemed to mean video tapes and any recording material that is now or may hereafter be used in place thereof.

3A. LICENSEE agrees to furnish to SOCIETY upon request during the term of this agreement a list of all musical compositions (or, at the option of LICENSEE, a list of all musical compositions licensed hereunder) broadcast from or through the station on LICENSEE's local television programs, showing the title of each composition and the composer and author thereof, and a brief notation of the scenery and costumes used, provided that LICENSEE shall not be obligated under this paragraph to furnish such a list covering a period or periods in the aggregate in excess of three months during any one calendar year.

B. At the request of SOCIETY, LICENSEE will furnish to SOCIETY the dialogue, if any, used in specified programs. In cases where dialogue is only available in recorded form, it will be sufficient for LICENSEE to permit SOCIETY to screen the recording. When the dialogue is available in written form in any of the cities where SOCIETY has an office and it is inconvenient for LICENSEE to make an additional copy, it will be sufficient if LICENSEE permits a representative of SOCIETY to examine the file copy of the dialogue at LICENSEE's office. LICENSEE will have no obligation to furnish SOCIETY with dialogue in cases where it does not have within its control either a written or recorded version of the dialogue.

C. With respect to motion pictures (or other prerecorded programs designed for presentation on a number of stations and for which cue sheets are customarily made) broadcast from or through the station on LICENSEE's local television programs, LICENSEE's obligations under subparagraphs A and B of this paragraph 3 shall be deemed to have been complied with if LICENSEE shall identify the picture for SOCIETY by its title, the name of the producer where available, and the copyright notice contained therein where available. If SOCIETY does not have a music cue sheet for such picture, and LICENSEE does have such a sheet, LICENSEE shall make such music cue sheet available to SOCIETY for examination at SOCIETY's request and SOCIETY shall return such sheet to LICENSEE promptly.

D. SOCIETY shall make requests pursuant to subparagraphs A and B of this paragraph 3 only where reasonably necessary for its purposes and, except where the information is necessary with respect to SOCIETY's survey of past performances, shall give LICENSEE notice of any request under subparagraph A at least three months prior to the commencement of the period covered by said request. The provisions of subparagraphs B and C of this paragraph 3 shall not limit LICENSEE's obligation to cooperate with SOCIETY in connection with any claim, demand or action referred to in subparagraph 11A of this agreement.

4A. The members of SOCIETY shall have the right, at any time and from time to time, in good faith, to restrict the television broadcasting of compositions from musical comedies, operas, operettas and motion pictures, or any other composition being excessively broadcast, only for the purpose of preventing harmful effect upon such musical comedies, operas, operettas, motion pictures or compositions, in respect to other interests under the copyrights thereof; provided, however, that the maximum number of compositions which may be at any time thus restricted shall not exceed 750 and moreover that limited licenses will be granted upon application to SOCIETY entirely free of additional charge as to restricted compositions, if and when the copyright owners thereof are unable to show reasonable hazards to their major interests likely to result from such television broadcasting; and provided further that such right to restrict any such composition shall not be exercised for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition; and provided further that in no case shall any charges, "free plugs", or other consideration be required in respect of any permission granted to perform a restricted composition; and provided further that in no event shall any composition, after the initial television broadcast thereof, be restricted for the purpose of confining further television broadcasts thereof to a particular artist, station, network or program.

B. SOCIETY reserves the further right, at any time and from time to time, in good faith, to restrict the television broadcasting of any compositions, over and above the number specified in the previous paragraph, only as to which any suit has been brought or threatened on a claim that such composition infringes a composition not contained in the repertory of SOCIETY or on a claim by a non-member of SOCIETY or by a member not listed in Schedule A, as the same may be

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augmented from time to time, that SOCIETY does not have the right to license the public performance of such composition by television broadcasting.

5A. In consideration of the license herein granted, LICENSEE agrees to pay to SOCIETY the following:

1. SUSTAINING FEE

a. If the station was licensed by SOCIETY on January 1, 1968, and had reported and paid license fees to SOCIETY under the terms of SOCIETY's Local Station Blanket Television License Agreement for thirty-six or more consecutive months by January 1, 1968, LICENSEE shall pay to SOCIETY,

(1) For each calendar month during the calendar year 1968, 70% of the highest quarter hour card rate of the station in effect on January 1, 1968 for a single quarter hour of television broadcasting, provided, however, that if such highest quarter hour card rate is less than $37\frac{1}{2}\%$ of the highest hour card rate published for the highest time classification, such highest quarter hour card rate shall be increased to $37\frac{1}{2}\%$ of such highest hour card rate, and if such highest quarter hour card rate is more than $42\frac{1}{2}\%$ of such highest hour card rate, such highest quarter hour card rate shall be decreased to $42\frac{1}{2}\%$ of such highest hour card rate.

(2) For each calendar month during the calendar years beginning with 1969, LICENSEE shall pay to SOCIETY an amount which bears the same ratio to the commercial fees reported and paid by the station for such month as the ratio that sustaining fees reported and paid by the station for the year 1968 shall bear to commercial fees reported and paid by the station for the year 1968.

(3) If the station did not publish both a quarter hour card rate and an hour card rate in the highest priced segment of its broadcast day (measured from station sign-on to station sign-off) in its rate card in effect on January 1, 1968, LICENSEE shall pay to SOCIETY for the calendar year 1968 an amount which bears the same ratio to the commercial fees reported and paid by the station for the year 1968 as the average ratio that sustaining fees bore to commercial fees for the year 1968 for stations having the same broadcast revenues for purposes of classification by the Federal

Communications Commission ("FCC") in the FCC Annual Report for the year 1968.

b. If the station was not licensed by SOCIETY on January 1, 1968, or had not reported and paid license fees to SOCIETY under the terms of SOCIETY's Local Station Blanket Television License Agreement for thirty-six or more consecutive months by January 1, 1968, LICENSEE shall pay to SOCIETY,

(1) For each calendar month in any calendar year beginning 1968 in which the station shall have reported and paid license fees to SOCIETY under the terms of SOCIETY's Local Station Blanket Television License Agreement for less than thirty-six consecutive months by June 30, and for the first calendar year in which the station shall have reported and paid license fees under such license agreement for thirty-six or more consecutive months by June 30 of such year, an amount which bears the same ratio to the commercial fees reported and paid by the station for such calendar year as the average ratio that sustaining fees bore to commercial fees for such calendar year for stations having the same broadcast revenues for purposes of classification by the FCC in the FCC Annual Report for such calendar year.

(2) For each calendar month during each succeeding calendar year, LICENSEE shall pay to SOCIETY an amount which bears the same ratio to the commercial fees reported and paid by the station for that calendar month as the ratio that sustaining fees bore to commercial fees reported and paid by that station for the first calendar year in which the station reported and paid license fees under such blanket license agreement for more than thirty-six consecutive months by June 30 thereof.

c. The computations under subparagraphs (a)(3) and (b)(1) of this subparagraph 5A1 shall be made by SOCIETY subject to verification by the firm of Arthur Andersen & Co. or such other independent accounting firm as may be designated by the United States District Court for the Southern District of New York (the "Independent Accounting Firm") and shall be made after giving effect to any adjustments of the quarter hour card rates of stations to 37½% or 42½% of their hour card rates, respectively, as provided in subparagraph (a)(1) of this subparagraph 5A1.

2. COMMERCIAL FEE

In addition, a sum equal to the aggregate of the following amounts:

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a. 2% of "station's basic net receipts" as defined herein for the applicable year (see subparagraph 6D); and

b. 1% of "station's increment" as defined herein for the applicable year (see subparagraph 6D).

B. The term "net receipts from sponsors" as used in this agreement shall be deemed to mean the "gross amount paid for the use of television broadcasting facilities of the station for LICENSEE's local television programs," as defined herein (reduced by the deductions specified in subparagraphs 5G, 5I, and 5J hereof), less any advertising agency commission not to exceed 15% of the remainder actually allowed to a recognized advertising agency not owned or controlled by LICENSEE. No deduction for advertising agency commissions may be taken for commissions paid on sums which are not included in, or which are deductible from, the "gross amount paid for the use of television broadcasting facilities of the station for LICENSEE's local television programs".

C. The term "net receipts from sponsors after deductions" as used in this agreement shall be deemed to mean net receipts from sponsors, less a sales commission on the net receipts from sponsors equal to 15% of such net receipts, unless LICENSEE is an independent station and elects to compute the license fees due SOCIETY under the itemized deduction method of reporting in accordance with subparagraph 5G of this agreement, in which event the deduction for sales commission on such net receipts shall equal 20% thereof, instead of 15%.

D. The term "gross amount paid for the use of television broadcasting facilities of the station for LICENSEE's local television programs" as used in this agreement shall be deemed to mean all payments made (whether in money or in any other form) by or on behalf of the sponsor of each program for the use of the television broadcasting facilities of the station for all such local television programs, after deducting only rate card discounts, quantity and/or frequency, actually allowed, and whether such payment shall have been made directly to LICENSEE or to any other persons, firms or corporations. Where merchandise, services, or any thing or service of value is received in lieu of cash consideration for the use of the television broadcasting facilities of the station, the same shall be described and the reasonable value thereof determined and accounting made to SOCIETY upon the same basis as if a regular billing had been made by LICENSEE therefor in a

sum equal to such reasonable value, which in no event shall be deemed to exceed LICENSEE's prevailing published card rate for such television broadcasting facilities.

LICENSEE's gross amount paid for the use of television broadcasting facilities of the station for LICENSEE's local television programs for any particular year shall not be less than the aggregate of:

(i) the amount reportable by LICENSEE to the FCC as LICENSEE's "total sale of station time" for the year (the amount reportable on Schedule 1, line 11 of FCC Form 324 in effect for the year 1968), and

(ii) the amount reportable by LICENSEE to the FCC as LICENSEE's "total incidental broadcasting revenues" for the year (the amount reportable on Schedule 1, line 18 of FCC Form 324 in effect for the year 1968),

plus all commissions, if any, deducted in reporting these amounts, reduced by revenues received from all regular national television networks and from any occasional television networks which are licensed by SOCIETY (as distinguished from its members) at the source, which are reported pursuant to (i) of this subparagraph.

E. The term "basic net receipts" as used in this agreement shall be an amount computed by adding the net receipts from sponsors after deductions computed as provided in subparagraphs E1 and E2 below, excluding from such computation the net receipts from sponsors after deductions computed as provided in subparagraph E3 below:

1. One-half of the total net receipts from sponsors after deductions reported and paid to SOCIETY for the years 1964 and 1965 by all local television stations (excluding television stations owned and operated by the three regular national television networks, ABC, CBS, and NBC)

a. which were licensed under the terms of SOCIETY's Local Station Blanket Television License Agreement during the years 1964 and 1965, and

b. which had been licensed by SOCIETY prior to July 1, 1961 and had submitted reports and payments under such Blanket License Agreement for the entire period from July 1, 1961 through December 31, 1965, on or before August 15, 1968, and

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c. which had not discontinued operations prior to July 1 of the calendar year for which such basic net receipts are being computed, and

d. with respect to the computation for the calendar years commencing January 1, 1974, which have renewed this agreement pursuant to paragraph 10 hereof.

2. The net receipts from sponsors after deductions reported to SOCIETY by all other local television stations (excluding stations described in subparagraph E3 below) for the calendar year in which such stations shall have submitted timely reports and payments of license fees under such blanket license agreement for thirty-six consecutive months by June 30 of any year subsequent to 1964. SOCIETY shall furnish the Independent Accounting Firm with a list of the stations whose net receipts from sponsors after deductions are not eligible for inclusion in the computation of basic net receipts by reason of the failure of such stations to have submitted timely reports and payments for thirty-six consecutive months by June 30 of any year subsequent to 1964. Each such station shall be deemed to have submitted timely reports and payments for thirty-six consecutive months by June 30 of any year subsequent to 1964 if such reports and payments are submitted to SOCIETY not later than sixty days after SOCIETY has furnished to the Independent Accounting Firm the list of stations as provided in this subparagraph E2. The net receipts from sponsors after deductions for the calendar year included in the basic net receipts with respect to such stations shall be subject to adjustment if required as a result of a subsequent examination of the station's books and records for the particular year pursuant to paragraph 8 of this agreement.

3. There shall be excluded from the computation of basic net receipts the net receipts from sponsors after deductions for all local television stations which

a. were licensed under the terms of SOCIETY's Local Station Blanket Television License Agreement prior to July 1, 1961 and had not submitted reports and payments under such Blanket License Agreement for the entire period from July 1, 1961 through December 31, 1965 on or before August 15, 1968, or

b. were not licensed under the terms of SOCIETY's Local Station Blanket Television License Agreement prior to July 1, 1961 but (i) had been broadcasting on a regular basis for thirty-six or more consecutive months prior to June 30, 1964 and (ii) had not submitted reports and payments to SOCIETY under the terms of such Blanket License Agreement for thirty-six or more consecutive months by June 30, 1964.

F. The term "increment" as used in this agreement shall be deemed to mean an amount equal to the excess, if any, above the basic net receipts applicable to a particular year, of the aggregate of the net receipts from sponsors after deductions reported and paid to SOCIETY in each of the years beginning with 1968 by only those stations whose net receipts from sponsors after deductions are included in the basic net receipts applicable to such year. Net receipts from sponsors after deductions for stations whose net receipts from sponsors after deductions are not included in computing basic net receipts shall not be considered in computing increment.

G. LICENSEE may deduct the following amounts from the gross amount paid for the use of television broadcasting facilities of the station for LICENSEE's local television programs:

1. *Film Costs*: LICENSEE may deduct 80% of the cost of films or video tapes purchased by LICENSEE for use on prerecorded feature film programs, cartoons, or syndicated film or video tape programs.

2. *Talent Costs*: LICENSEE may deduct the following payments to personnel who appear on the air on LICENSEE's local television programs:

- a. *Talent Especially Engaged for a Particular Program or Programs*: LICENSEE may deduct the salary and talent fees paid to on-the-air talent especially engaged for a particular program or programs whose sole duties are acting as on-the-air talent personalities and in preparing therefor.

- b. *Staff Announcers*: LICENSEE may deduct talent fees paid to staff announcers above their base salaries.

- c. With respect to personnel other than those covered by the provisions of subparagraph G2a who appear on the air on LICENSEE's local programs on a regular basis and who

also have other duties (such as, for example, a sports announcer who is also a sports director or a newscaster who is also a news director of the station), LICENSEE may deduct the talent fees paid to such personnel above their base salaries, up to a maximum of half of the total annual compensation paid such individual with respect to all of his duties.

3. *Rights Costs*: LICENSEE may deduct the actual payments made by LICENSEE for broadcast rights for a specific local commercial sports program or other special event. The amount deducted by LICENSEE for broadcast rights may not exceed the amount actually paid to or for the original holder of the broadcast rights for the particular event.

4. *Remote Lines*: LICENSEE may deduct the actual payments made by LICENSEE for a specific local commercial program to or for the telephone company or like transmission utility for remote pickup necessary to broadcast that program from a point outside the studio of the station. The amount deducted by LICENSEE as payment for remote lines may not exceed the amount actually paid to or for the telephone company or like transmission utility.

5. *Prizes to Participants on a Program*: LICENSEE may deduct the actual payments made by LICENSEE for a specific local commercial program for prizes to participants who appear on that program.

6. *Outside News Service*: LICENSEE may deduct 80% of the actual payments made by LICENSEE for news service purchased by LICENSEE from a bona fide supplier of news service (such as, for example, AP or UPI or other similar agency) not affiliated, or in common ownership, with LICENSEE.

H. Co-operative programs are programs which are furnished by a regular national television network or by an occasional television network licensed by SOCIETY (as distinguished from its members) at the source to its affiliated stations under an arrangement permitting an affiliate to broadcast such programs on a sustaining basis or on a commercial basis under the sponsorship of a local, regional or national advertiser contracting directly with such affiliated station or its representative for the incorporation of the commercial credits of such advertiser into the program as broadcast by such affiliated station. For the purposes of this agreement only, and without prejudice to the

position of SOCIETY or LICENSEE or any network of which LICENSEE is an affiliated station as to the status of co-operative programs under SOCIETY's non-visual broadcasting licenses, such co-operative television programs shall be deemed to be network television programs as defined herein.

I. No payment shall be required hereunder with respect to any sums received from political local television programs of LICENSEE.

J. No payment shall be required hereunder with respect to a local commercial television program of LICENSEE presented by motion picture or by transcription if a license has been granted by SOCIETY (as distinguished from its members) at the source to perform on such local commercial television program by means of such motion picture or such transcription, as the case may be, the musical compositions embodied therein.

K. If any local television program of LICENSEE produced solely for broadcasting purposes is presented in a studio, auditorium or hall where an audience is admitted free of charge, or where the entire admittance charge is paid to an eleemosynary institution which shall request a gratuitous license from SOCIETY, no additional royalties or fees shall be charged by reason of the presence of such audience.

6A. On or before the last day of February in each calendar year during the term of this agreement, SOCIETY shall compute the following:

1. The basic net receipts applicable to the preceding year, adjusted to delete net receipts from sponsors after deductions previously included in the basic net receipts for stations that had either (a) discontinued operations prior to July 1 of the preceding calendar year, or (b) with respect to the calendar years commencing January 1, 1974, did not renew this agreement pursuant to paragraph 10 hereof, and to add net receipts from sponsors after deductions for stations that submitted, for the first time, timely reports and payments of license fees under SOCIETY's Local Station Blanket Television License Agreement for thirty-six or more consecutive months by June 30 of that year as provided in subparagraph 5E2 of this agreement; and

2. The increment applicable to the preceding year.

Upon completion of these computations, SOCIETY shall submit the results for verification to the Independent Accounting Firm. SOCIETY

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shall give the Independent Accounting Firm (i) a list showing each station whose net receipts from sponsors after deductions are included in the basic net receipts and in the increment applicable to the preceding year, and showing each station not included together with an explanation of the basis for the exclusions, and (ii) a list showing the amount of net receipts from sponsors after deductions for each station so included for said preceding year. SOCIETY shall make available to the Independent Accounting Firm the books and records of SOCIETY necessary to verify SOCIETY's computations. The Independent Accounting Firm shall consider all data and information coming to its attention in connection with SOCIETY's computations as completely and entirely confidential.

B. Not later than March 31 of each year, the Independent Accounting Firm shall complete its verification of SOCIETY's computations and (after having previously discussed the matter with SOCIETY and having allowed SOCIETY to make adjustments, if any, which SOCIETY deems appropriate) shall notify SOCIETY and the "All-Industry Television Station Music License Committee" (the "All-Industry Committee") of its conclusions. LICENSEE hereby appoints the All-Industry Committee as its attorney in fact for the purpose of reviewing these computations. If SOCIETY and the All-Industry Committee fail to agree on any computations, the matter shall be submitted to the United States District Court for the Southern District of New York for determination as provided in the order entered by said Court in *U. S. v. ASCAP; In the Matter of the Application of Shenandoah Valley Broadcasting, Inc. et al.*, Civil Action No. 13-95, July 28, 1969.

C. Within thirty days after the computations under subparagraph A have been made and verified, or within thirty days after such computations have been determined in accordance with subparagraph B, SOCIETY shall notify LICENSEE of the amount of the basic net receipts applicable to the preceding year and the amount of any increment applicable to the preceding year.

D. Upon receipt of such notice, LICENSEE shall divide its net receipts from sponsors after deductions for the calendar year covered by such notice in proportion to the basic net receipts and increment computed and verified for that year. The resulting amounts shall be "station's basic net receipts" and "station's increment" respectively.

LICENSEE shall compute the license fees due for that year in accordance with the terms of subparagraph 5A of this agreement. In the event that the commercial fees and sustaining fees due SOCIETY for that year are greater than the commercial fees and sustaining fees actually paid by LICENSEE for that year, LICENSEE shall submit such additional commercial fees and sustaining fees within thirty days after receipt of such notice from SOCIETY. In the event that the commercial fees and sustaining fees due SOCIETY for that year are less than the commercial fees and sustaining fees actually paid by LICENSEE for that year, LICENSEE shall apply such excess payments in computing its monthly accountings to SOCIETY for the month or months immediately following receipt of such notice from SOCIETY.

E1. By October 15 of each year (the "current year"), SOCIETY shall estimate the basic net receipts and increment for the succeeding year and shall report its estimate to the Independent Accounting Firm and to the All-Industry Committee.

a. An estimate of net receipts from sponsors after deductions for the current year shall be made by determining that amount which bears the same ratio to net receipts from sponsors after deductions reported and paid to SOCIETY by stations whose net receipts from sponsors after deductions were included in computing basic net receipts for the preceding year as (i) net receipts from sponsors after deductions reported and paid to SOCIETY for the first eight months of the current year by stations whose net receipts from sponsors after deductions are to be included in computing basic net receipts applicable to such year bears to (ii) net receipts from sponsors after deductions reported and paid to SOCIETY for the first eight months of the preceding year by stations whose net receipts from sponsors after deductions were included in computing basic net receipts applicable to such preceding year.

b. The estimate for the succeeding year shall be projected by adjusting the estimate for the current year by the same percentage change, if any, between the estimate for the current year and the amounts for the preceding year.

c. Increment shall be estimated as the excess, if any, of estimated net receipts from sponsors after deductions above estimated basic net receipts.

2. With the estimate, SOCIETY shall furnish the Independent Accounting Firm a schedule showing the stations whose net receipts from sponsors after deductions were included or were excluded for any period in computing the estimate, together with an explanation of the basis for the exclusions. The Independent Accounting Firm shall verify said computation and estimate for the succeeding year by December 1 of the current year. LICENSEE hereby authorizes the Independent Accounting Firm to notify LICENSEE in confidence if it appears that LICENSEE's net receipts from sponsors after deductions were excluded from the computation of estimated basic net receipts or increment for the current year because of failure to file timely reports or to make timely payments.

3. Promptly after such verification, SOCIETY shall notify LICENSEE of the basic net receipts and increment for the succeeding year as estimated and verified. LICENSEE shall compute its monthly accountings to SOCIETY for such succeeding year by dividing its net receipts from sponsors after deductions into station's basic net receipts and station's increment in proportion to the basic net receipts and increment as estimated and verified for that year.

7A. As to SUSTAINING FEE, LICENSEE shall on the twentieth day of each month during the term hereof pay to SOCIETY the monthly sustaining fee payable hereunder and such payments shall be accompanied by statements setting forth the basis upon which the computation is made.

B. As to COMMERCIAL FEE, LICENSEE shall render monthly statements to SOCIETY on or before the twentieth day of each month covering the period of the preceding calendar month, on forms supplied gratis by SOCIETY, with respect to all gross amounts paid for the use of television broadcasting facilities for LICENSEE's local television programs, and also showing all deductions in order to arrive at net receipts from sponsors and net receipts from sponsors after deductions as herein provided, without exception, and the division of its net receipts from sponsors after deductions between station's basic net receipts and station's increment as herein provided, and the percentages thereof payable to SOCIETY, which statements shall be accompanied by the remittance due SOCIETY under the terms hereof.

C. Accountings and payments shall be made on a billing basis, with the right of deduction or rebate for bad accounts and discounts

allowed or rebates paid. All billings made subsequent to the termination of this agreement with respect to local television broadcasts made during the term hereof shall be accounted for by LICENSEE as and when such billings are made by LICENSEE.

8. SOCIETY shall have the right, by its duly authorized representatives, at any time during customary business hours, to examine the books and records of account of LICENSEE only to such extent as may be necessary to verify (a) any statement of accounting required pursuant hereto, and (b) any statement of accounting to SOCIETY required of a network in connection with co-operative television programs made available to LICENSEE by such network. SOCIETY shall consider all data and information coming to its attention as a result of any examination of such books and records as completely and entirely confidential.

9. Upon any breach or default by LICENSEE of any terms herein contained relating to the reports, accountings or payments required to be made by LICENSEE, SOCIETY may give LICENSEE thirty days notice in writing to cure such breach or default, and in the event that such breach or default has not been cured within said thirty days, SOCIETY may then promptly terminate this license.

10. This agreement and all the terms and conditions thereof shall be renewed and extended for all purposes for an additional period from January 1, 1974 through December 31, 1977 ("the additional period") unless either

A. LICENSEE gives SOCIETY written notice on or before December 31, 1972 that LICENSEE elects not to renew and extend the agreement for the additional period, or

B. SOCIETY gives LICENSEE written notice on or before February 28, 1973 that SOCIETY elects not to renew and extend the agreement for the additional period.

11A. SOCIETY agrees to indemnify, save and hold LICENSEE, its sponsors and their advertising agencies, its and their artists, and each of them harmless, and defend LICENSEE, its sponsors and their advertising agencies, its and their artists, and each of them from and against any claim, demand or suit that may be made or brought against them or any of them with respect to performances given on LICENSEE's local television programs during the term hereof in accordance

with this license of (a) "cleared compositions", or (b) musical compositions heretofore copyrighted, composed or written by members of SOCIETY listed in Schedule A as augmented from time to time and now or hereafter during the term hereof in the repertory of SOCIETY, or (c) musical compositions hereafter during the term hereof copyrighted, composed or written by such members of SOCIETY, or (d) musical compositions which SOCIETY shall hereafter certify in writing to LICENSEE as musical compositions copyrighted, composed or written by such members of SOCIETY and included in SOCIETY's repertory for the purposes of this agreement, or (e) musical compositions "deemed to be included in the repertory of SOCIETY" in accordance with the provisions of subparagraph C of this paragraph 11. In the event of the service upon LICENSEE of any notice, process, paper or pleading under which a claim, demand or action is made or begun against LICENSEE on account of any such matter as is hereinabove referred to, LICENSEE shall promptly give SOCIETY written notice thereof and simultaneously therewith deliver to SOCIETY any such notice, process, paper or pleading, or a copy thereof, and SOCIETY at its own expense shall have sole charge of the defense of any such action or proceeding. LICENSEE, however, shall have the right to engage counsel of its own, at its own expense, who may participate in the defense of any such action or proceeding and with whom counsel for SOCIETY shall cooperate. LICENSEE shall cooperate with SOCIETY in every way in the defense of any such action or proceeding, and in any appeals that may be taken from any judgments or orders entered therein, and shall execute all pleadings, bonds or other instruments, but at the sole expense of SOCIETY, that may be required in order properly to defend and resist any such action or proceeding, and prosecute any appeals taken therein. In the event of the service upon LICENSEE of any notice, process, paper or pleading under which a claim, demand or action is made or begun against LICENSEE on account of the performance on LICENSEE's local television programs of any musical composition (other than a "cleared composition") contained in the repertory of SOCIETY but not heretofore or hereafter during the term hereof copyrighted, composed or written by members of SOCIETY and not certified by SOCIETY as a musical composition copyrighted, composed or written by members of SOCIETY, SOCIETY agrees at the request of LICENSEE to cooperate with and assist LICENSEE in the defense of any such action or proceeding, and in any appeals that LICENSEE may elect to take from any judgments or orders entered therein.

B. As used in this paragraph 11, a "cleared composition" shall mean any composition in the repertory of SOCIETY, not copyrighted, composed or written by a member of SOCIETY, which SOCIETY shall have notified LICENSEE is a composition with respect to which SOCIETY is willing to indemnify LICENSEE, provided that the performance of such composition shall be made on the specific local television program of LICENSEE for which a clearance shall have been given by SOCIETY; provided further, however, that in the event that SOCIETY notifies LICENSEE in writing that it is willing to clear such a composition without limitation to a specific program, such composition shall thereafter be regarded as a "cleared composition" until such time as SOCIETY shall rescind such clearance.

C. For the purpose of this paragraph 11 only, any musical composition (other than a musical composition or group of musical compositions expressly excepted therefrom or that may be restricted because of the operation of paragraph 4 of this agreement) which is listed in the bound volumes entitled "ASCAP Index 1963", as the same may have been revised heretofore or as the same may hereafter be revised, as a musical composition heretofore copyrighted by a present member of SOCIETY listed in Schedule A, as such list of present members may be augmented from time to time, shall be deemed to be included in the repertory of SOCIETY. SOCIETY shall have the right to make reasonable revisions in such Indices from time to time, provided, however, that no such revision and no exception referred to above shall be effective as to any broadcast of LICENSEE's local programs made, or delayed or repeat broadcasts thereof scheduled, prior to the date on which LICENSEE shall have received notice of such revision or exception. Nothing in this subparagraph C shall be deemed to limit LICENSEE's rights or to limit or affect LICENSEE's obligations to pay the license fees payable under this agreement or to limit SOCIETY's obligations to indemnify as provided in subparagraph A of this paragraph 11.

D. The provision contained in paragraph 11 shall apply to LICENSEE's sponsors and their advertising agencies, and its or their artists, as to LICENSEE's local television programs with the same effect as if in each instance there had been added to "LICENSEE" the words "its sponsors and their advertising agencies, its and their artists, and each of them."

12. In the event of the termination or suspension of the governmental licenses covering the station or any substantial alteration or variation of the terms and conditions thereof, or any major interference with the operations of the station due to governmental measures or restrictions, LICENSEE shall have the right to terminate this agreement upon seven days notice.

13. In the event of:

A. any major interference with the operations of SOCIETY in the state, territory, dependency, possession or political subdivision in which the station is located, by reason of any law of such state, territory, dependency, possession or political subdivision; or

B. any substantial increase in the cost to the SOCIETY of operating in such state, territory, dependency, possession or political subdivision, by reason of any law of such state, territory, dependency, possession or political subdivision, which is applicable to the licensing of performing rights,

SOCIETY shall have the right to apply to the United States District Court for the Southern District of New York for an order terminating this agreement.

14. The meaning of the provisions of this agreement shall be construed in accordance with the law of the State of New York.

15. All notices required or permitted to be given by either of the parties to the other hereunder shall be duly and properly given if mailed to such other party by registered United States mail addressed to such other party at its main office for the transaction of business.

16. This agreement shall enure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns, but no assignment shall relieve the parties hereto of their respective obligations hereunder as to performances broadcast, acts done and obligations incurred prior to the effective date of the assignment.

17. Annexed hereto is a letter dated July 28, 1969, from counsel for SOCIETY to counsel for the All-Industry Committee, setting forth the understanding of the parties with respect to certain additional

license terms which shall be deemed as fully a part of this agreement as if set forth herein.

IN WITNESS WHEREOF, this agreement has been duly executed by
SOCIETY and LICENSEE this day of , 19 , as of the
day of , 19 .

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

By

.....
LICENSEE

By

Title

MURRAY HILL 8-8800

CABLE ADDRESS: ASCAP, NEW YORK

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS
575 MADISON AVENUE
NEW YORK, N. Y. 10022

HERMAN FINKELSTEIN
GENERAL COUNSEL

July 28, 1969

Donald Schapiro, Esq.
Barrett Knapp Smith & Schapiro
26 Broadway
New York, New York 10004

Re: U.S. v. ASCAP (Application of Shenandoah
Valley Broadcasting, Inc., et al.)

Dear Mr. Schapiro:

This letter sets forth our understanding with respect to certain matters not expressly covered by the proposed new blanket television agreement submitted to Judge Ryan for approval in connection with the final order entered in the above proceeding.

These matters were discussed in the negotiations conducted by the All-Industry Television Station Music License Committee. It was the mutual desire of your committee and of the Society's television negotiating committee to avoid future misunderstandings as much as possible by setting forth all of the deductions which may be taken under the license agreement, and by spelling out in detail various understandings we have reached concerning the methods of computing the amounts which must be reported to the Society and which may be deducted under the license agreement.

With the aid of the Court, we have agreed upon the following, which shall be deemed a part of the blanket agreement:

1. The footnote to line 1 of the reporting form reads "all revenue must be reported on this line including 'total sale of station time' (FCC Form 324, Schedule 1, line 11) plus 'total incidental broadcast revenues' (FCC Form 324, Schedule 1, line 18) plus all commissions, if any, deducted in reporting these amounts."

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Reports to the Society shall be made in accordance with the following:

(a) Line 1 of the reporting form shall include all payments to or on behalf of the station made by or on behalf of the sponsor of each program broadcast on the station which are related to such program, including, without any limitation, payments for program material, rights, production, commercials, studio charges, line charges, manpower, equipment, and facilities charges. Line 1 shall also include all revenues, if any, relating to any item for which a deduction is taken in reporting to the Society.

(b) Revenue received by a reporting station from the sale to others for broadcast on another station of programs broadcast by the reporting station ("syndication revenue") shall be reported as follows:

(i) a station electing the optional standard deduction shall not report any syndication revenue to the Society unless the station itemized deductions at the time the particular program was originally broadcast and failed to elect, pursuant to sub-paragraph (ii) hereof, not to claim any deductions with respect to such program.

(ii) a station itemizing deductions shall report all syndication revenue to the Society except as to programs for which it has elected not to claim any deductions. Such election shall be made by advising the Society, concurrently with the report for the period during which the program was originally broadcast, that a particular program (with appropriate description) was produced for syndication, and that no deductions have been or will be taken by such station with respect to such program. For this purpose, each episode in a series may be treated as a separate program.

(c) Payments received for the following are not reportable if such payments are not required to be included under paragraphs (a) and (b) above:

(i) furnishing manpower or equipment to a company (whether network, station, or a company not involved in broadcasting), where such revenue is not related to the reporting station's broadcasting activities;

(ii) production of films or other material solely for non-broadcast use; and

(iii) production for another of television programs or commercials where the production is not related to the sponsorship of such programs or commercials on the station.

(d) Where the sponsor of a program broadcast on the station engages in a transaction with the station which produces revenue for the station which would not otherwise be includible on line 1, the amount of such revenue shall nevertheless be included on line 1 to the extent, if any, that such revenue exceeds the revenue which would have been received by the station if the transaction had been between two parties substantially similar to the station and the sponsor but having no sponsorship relation and dealing at arm's length.

(e) In the event a person, firm or corporation affiliated with or related to the station receives amounts from the sponsor of a program broadcast on the station related to such broadcast, such amounts and applicable deductions, if any, shall be included in the station's reports to the Society.

Within 120 days following the close of each calendar year, each station shall have the following options:

(A) To send the Society a copy of Schedule 1 of the FCC Form 324 filed by the station for that year (or a copy of such other reporting form as the FCC may require the station to use during the term of this agreement to report the data that appear on Schedule 1 of the FCC Form 324 in effect for the year 1968), at the time such report is filed with the FCC, or

(B) To submit to the Independent Accounting Firm a copy of Schedule 1 of the FCC Form 324 (or any replacement thereof) submitted by the station to the FCC for the particular year at the same time as that form is submitted to the FCC, with instructions to the Independent Accounting Firm to copy the data supporting the station's computations of its "gross revenues" as reflected on lines 1 and 3 of the station's reports submitted to the Society for the year and to submit that data to the Society, or

(C) To direct the FCC to permit the Independent Accounting Firm to copy from the FCC Form 324 (or any replacement thereof) submitted by the station to the FCC for the particular year

Letter, Paragraph 2

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the data supporting the station's computation of its "gross revenues" as reflected on lines 1 and 3 of the station's reports submitted to the Society for the year.

If the station elects to proceed under subparagraph (b), the Independent Accounting Firm shall furnish the data promptly to the Society. If the station elects to proceed under subparagraph (c), the Independent Accounting Firm shall furnish the data to the Society as promptly as possible, but not later than October 1 of the following year. If the Independent Accounting Firm does not furnish the data to the Society for any year by October 1 of the following year, the options set forth in subparagraphs (b) and (c) shall no longer be available to the station for that year and the station shall be required to send promptly to the Society a copy of Schedule 1 of the form filed by the station with the FCC for that year.

In the event that the amount which the station reported to the FCC is greater than the "gross revenues" as reflected on lines 1 and 3 of the station's reports submitted to the Society for the year, the option set forth in subparagraph (c) shall not be available to the station for the five succeeding years, and the station shall be required to send the Society a copy of Schedule 1 of the form filed by the station with the FCC for each of such five years, as provided in subparagraph (a) above, at the time each such report is filed with the FCC, or to send a copy of such schedule to the Independent Accounting Firm for each of such five years, as provided in subparagraph (b) above, for transmittal by the Independent Accounting Firm to the Society within twenty days.

The Society shall be entitled to request and to receive from the Independent Accounting Firm the data for any station or group of stations prior to October 1 of any year. The Independent Accounting Firm shall use its best efforts to comply with any such request by the Society.

The Society shall consider all FCC data coming to its attention pursuant to this paragraph as completely and entirely confidential.

2. The amount which a station must enter on line 1 of the report form shall include all amounts received by the station from all television networks, whether or not such networks are licensed by the Society at the source. Revenues received from all regular national television networks and from any occasional television network which

is licensed by the Society (as distinguished from its members) at the source are to be deducted on lines 4a and 4b of the report form.

(a) If the station is affiliated in common ownership with an occasional television network not licensed by the Society at the source, the revenues which the station must include on line 1 of its reports to the Society shall not be less than the amount which the station would have received if the transaction had been between two parties substantially similar to the station and its affiliated occasional television network, but not affiliated in common ownership, dealing at arm's length for the broadcast by the station of the programs of the occasional television network.

(b) A program broadcast by a group of two or more stations constituting neither a regular national television network nor an occasional television network as defined in the license is a local television program, and all payments made by or on behalf of the sponsors of the program shall be reported on line 1 of the station's report form.

3. No accounting need be made to the Society with respect to the following trade deals:

(a) *Film Trades*: if the station receives films in return for carrying announcements (whether incorporated in the film or included in other programs), the station shall not be required to include any revenues with respect to such announcements on line 2 of its report form, but no other deduction may be taken by the station for the cost of that film—the value of the spots furnished by the station and otherwise reportable as revenue being considered to be a complete offset to the deductible cost of film.

(b) *In-store Promotion*: if the station pursuant to an agreement with a sponsor provides that sponsor with both announcements for the sponsor and, in addition, promotion space in stores in which the sponsor's product advertised on the station is sold, and where the station, in accordance with the agreement, gives the store in which the product is sold spot announcements on the station in return for promotion space for the sponsor's product in the store, the transaction shall be reported as follows: The station shall include in its gross revenues on line 1 the entire amount paid by the sponsor for both the use of the station's facilities and for the promotion space in the store. The station shall not be required to include on line 2 any additional amount

representing the trade with the store for the in-store promotion space. The latter transaction shall be considered a "wash"—the revenue for the in-store promotion being completely offset by the value of the spots given to the store.

(c) *Radio-Television Cross Promotions*: if a television station provides announcements to another station (radio or television) in return for announcements on the latter station promoting such television station, such television station shall not be required to include any revenue with respect to any such announcements on line 2 of the report form, provided that the station to which the announcements are furnished is licensed by the Society under this Local Station Blanket Television License Agreement in the case of a television station or, in the case of a radio station, under the terms of the license agreement known as the "Local Station Blanket Radio License Agreement" in effect between the Society and radio stations on January 1, 1969, or, for the period after February 29, 1972, as such agreement may be extended or modified for the majority of radio stations.

(d) *Trades with Newspapers*: if the station exchanges announcements of newspapers on its station in return for advertisements of the station in such newspapers, the amount to be included by the station on line 2 of its report form shall be computed as follows:

(i) If the newspaper is affiliated with the station in common ownership:

50% of the amount which the station would charge any other advertiser purchasing those announcements on a "run of schedule basis."

(ii) If the newspaper is not affiliated with the station in common ownership:

100% of the amount which the station would charge any other advertiser purchasing those announcements on a "run of schedule basis."

(iii) If the announcements of any newspaper appear in time periods which are not available for sale on a "run of schedule basis", the value of the announcements shall be based on the station's card rates for such programs or time period.

The station may elect to compensate the Society for such newspaper announcements by making available to the Society periods

of time for institutional announcements in behalf of the Society determined as follows:

The total number of seconds of announcements given by the station to such newspaper advertisers for announcements in any calendar year shall be multiplied by 1.8%, except that if in the preceding calendar year the increment is at least 10% more than basic net receipts, the total number of seconds of announcements given by the station to such newspaper advertisers for announcements shall be multiplied by 1%. The value of the periods of time given to the Society in accordance with this provision shall not be considered in making any other computations or payments required to be made under this agreement.

If the station elects to compensate the Society for such newspaper announcements by making available to the Society periods of time computed as set forth above, the station shall not be required to include any revenues with respect to such newspaper announcements on line 2 of this report form or elsewhere.

The station may make such election for any calendar year during the term of this agreement by notifying the Society in writing not less than ninety days in advance of the beginning of the calendar year to which the election relates, and may revoke such election for any subsequent calendar year by giving the Society not less than ninety days advance written notice.

4. The following are additional examples of how the most common types of trade deals are to be reflected in the station's monthly reports:

(a) *Trades with TV Guide*: if the station gives *TV Guide* announcements in return for advertising space in *TV Guide*, the amount which the station must include on line 2 of its monthly report form shall be the amount which *TV Guide* would charge any other advertiser for the advertising space which the station received, computed in accordance with the applicable *TV Guide* rate card.

(b) *Trades for automobiles, hotel space, airplane tickets, magazine advertising space or other similar product or service*: if the station gives announcements in return for the use of automobiles, hotel space, airplane tickets, magazine advertising

space, or other similar product or service the amount which the station must include on line 2 of its monthly report form shall be the amount which an outside purchaser for cash would have to pay the supplier for such merchandise or services.

(c) *Announcements on behalf of related services, products, magazines or companies:* if the station gives announcements to promote a service, product, magazine, company or other enterprise with which it is affiliated in common ownership (except for newspapers or other broadcasting stations, which are subject to the provisions of subparagraphs 3(c) and 3(d) of this letter), the amount which the station must include on line 2 of its monthly report form shall be the amount which the station would charge any other advertiser dealing at arm's length with the station for the announcements furnished by the station to its affiliated company.

(d) With respect to any trade deal, the amount to be included by the station on line 2 of its monthly report form shall not exceed the station's card rate for the broadcasting facilities which the station furnished the sponsor.

5. Subparagraph 7C of the license provides for a deduction or rebate for bad accounts. On line 6b of its report form, a station may deduct bad accounts which were included in the station's "gross revenues" as reflected on line 1 of the station's prior monthly accountings to the Society. This deduction may be taken only at the time such bad accounts are actually written off by the station. In the event that the station makes any subsequent recovery of any bad accounts previously written off and deducted in the station's monthly accountings to the Society, the amount of such recovery shall be included on line 1 of the station's monthly report for the period in which such recovery is made.

6. With respect to the permissible deduction for film costs in accordance with subparagraph 5G1 of the license (line 8a of the itemized deduction report forms), the amount which the station may deduct each month shall be computed by taking the amount actually paid to the film distributor (including express charges and print costs) and dividing it by the total number of months for which the contract with the film distributor covering the broadcast of the films or video tapes is in force, provided, however, that if a different method of write-off shall be allowed by the Internal Revenue Service as the deductible cost

of that film for the purpose of computing the station's federal income tax, the station may, at its option, use that method if it exhibits to the Society the appropriate schedules from the station's federal income tax return showing the amount allowed by the Internal Revenue Service as the deductible cost of the film. The station's monthly deduction for film costs shall be 80% of the resulting figure, subject to the following exceptions:

(a) If the station purchased the films or video tapes from anyone other than a film distributor, or acquired such films or video tapes in connection with a purchase of a station, the amount used by the station in computing its deduction for film shall not exceed the amount actually paid to the film distributor (including express charges and print costs) by the station or network that originally purchased the films or video tapes less the amount deducted as film cost by the station or network that originally purchased the films or video tapes in previous monthly accountings by that station to the Society.

(b) If the supplier of any films or video tapes is affiliated with the station in common ownership, the amount which the station may use in computing its monthly deduction for film cost shall not exceed the amount that the films or video tapes would cost if the transaction had been between two parties substantially similar to the station and its affiliated film supplier but not affiliated in common ownership, dealing at arm's length for the right to broadcast the films or video tapes on the station.

7. With respect to the permissible deduction for talent cost in accordance with subparagraph 5G2 of the license (line 8b of the itemized deduction report forms):

(a) An on-the-air talent personality whose duties include assembling and preparing material for broadcast on his own programs (such as, for example, a sports announcer who assembles and prepares interviews and other elements of his own program) shall be deemed to be an on-the-air talent personality whose sole duty is acting as such. Promotional appearances by an on-the-air talent personality in behalf of his own program shall be considered part of the duties of an on-the-air talent personality.

If, in addition to preparing his own material, or performing other duties related solely to his own program, an individual also

assembles or prepares material for other programs or has general supervisory, administrative or other duties not related solely to his own program, the salary and talent fees paid to that individual shall be treated in accordance with subparagraph 5G2c of the license.

(b) In computing the base salary for staff announcers, if the station is not a party to an agreement with the American Federation of Television and Radio Artists (AFTRA) covering the talent fees payable to the station's staff announcers, the amount which the station may deduct as talent fees shall be determined by dividing the total amounts paid to each staff announcer between base salary and talent fees in the ratio that the average "40 hour weekly wage" (which shall be deemed to be the equivalent of base salary) bears to the average "gross weekly compensation" for staff announcers in stations in the same category of market size and geographic location as shown in the *Wages, Hours and Employment Report for Television* published by the National Association of Broadcasters for the year covering or closest to the period in question.

(c) In computing the amount deductible as talent costs, there shall be excluded from the salary or talent fees paid to any individual any social security expenses or other payroll costs, petty cash expenses, and pension fund contributions paid to or for the account of any such individual whose compensation is otherwise deducted in whole or in part.

8. An independent station that itemizes its deductions may deduct on line 8g of the itemized deduction report form for independent stations an additional amount equal to 5% of the station's "gross revenue" attributable to the station's locally produced remote programs and included in line 7 of such itemized deduction report form.

The "station's locally produced remote programs" shall be deemed to mean a local television program produced by the station having a minimum duration of thirty minutes consisting of the broadcast of a sports event or other public event taking place outside a studio of the station (such as, for example, a church service, awards banquet, or similar public event) of which at least 90% of the program time (excluding time for commercial announcements) consists of either:

(a) the broadcast of the event transmitted simultaneously by the station, or

(b) the broadcast of the event recorded at the station simultaneously with the event and broadcast on a "delayed" basis within twenty-four hours after the event, except that in extraordinary circumstances the broadcast may take place up to seven days after the event actually occurred.

The station's gross revenue attributable to its locally produced remote programs shall consist of all of its gross revenue attributable to the sale of such programs including announcements within such programs and announcements broadcast in the station breaks immediately preceding such programs.

In the event that the station adopts a method of accounting which allocates a disproportionate share of the station's revenues to announcements broadcast in the station breaks immediately preceding its locally produced remote programs, the Society may elect to disregard the method of accounting used by the station and to divide the revenues for such announcements equally between the programs preceding the announcements and the programs following them.

9. Optional Standard Deduction. In lieu of computing its accountings to the Society using the itemized deduction method of reporting set forth in subparagraph 5G of the license and in paragraphs 6, 7 and 8 of this letter, each station may elect to compute its accountings to the Society using the optional standard deduction method. The optional standard deduction shall be as follows:

(a) *Network Affiliates.* If the station is an affiliated station of a regular national television network as defined in subparagraph 2C of the license agreement, the station may submit its monthly reports on the form headed "Affiliated Station—Optional Standard Deduction" and take the following optional standard deduction:

(i) on line 10a of such report form, the station may deduct 15% of that portion of the amount reported on line 9 ("Balance Subject to Optional Standard Deduction") attributable to

(A) the station's locally produced remote programs (as defined in paragraph 8 of this letter), and

(B) the station's live local television programs (defined as any local television program of the station in which 36% or more of the time of the program [measured by the customary clock listings of program length—e.g.,

60 minutes, 30 minutes, 15 minutes] as broadcast by the station is live from the station);

(ii) on line 10b of such report form, the station may deduct 10% of the balance of said amount reported on line 9.

The station's gross revenue attributable to its live local television programs shall consist of all of its gross revenue attributable to the sale of such programs including announcements within such programs and announcements broadcast in the station breaks immediately preceding such programs.

(b) *Independent Stations.* If the station is an independent station, as defined in subparagraph 2D of the license, the station may submit its monthly reports on the form headed "Independent Station—Optional Standard Deduction" and take the following optional standard deduction:

(i) on line 10a of such report form, the station may deduct 37½% of that portion of the amount reported on line 9 ("Balance Subject to Optional Standard Deduction") of such report form attributable to the station's locally produced remote programs (as defined in paragraph 8 of this letter);

(ii) on line 10b of such report form, the station may deduct 32½% of that portion of the amount reported on line 9 attributable to the station's live programs (other than the station's locally produced remote programs) as defined in subparagraph 9(a) of this letter;

(iii) on line 10c of such report form, the station may deduct 10% of that portion of the amount reported on line 9 attributable to sales by the station of its announcements broadcast (a) within programs of an occasional television network not licensed by the Society at the source and (b) in the station breaks immediately preceding such programs. No deduction may be taken with respect to any other amounts attributable to programs of an occasional television network not licensed by the Society at the source;

(iv) on line 10d of such report form, the station may deduct 25% of the balance reported on line 9, after deducting the amounts used in computing the deductions under (i), (ii) and (iii) above, and excluding any amounts received by the station from any occasional television network not licensed by the Society at the source.

(c) No deduction may be taken by either a network affiliate or an independent station with respect to any amounts received by the station from any occasional television network which is not licensed by the Society at the source. Such amounts, computed as provided in paragraph 2 of this letter, shall be stated separately on line 8 of the report form.

(d) As shown on the Optional Standard Deduction report forms, the amount of the deductions allowed pursuant to subparagraphs (a) and (b) of this paragraph shall be computed after subtracting from the station's total gross local revenues (line 5) the deductions provided for on line 6a ("Gross Political Revenue"; see subparagraph 5I of the license); line 6b ("Bad Debts Written Off"; see subparagraph 7C of the license and paragraph 5 of this letter); line 6c ("Rate Card Discounts"; see subparagraph 5D of the license); and line 6d ("Revenue from Local Programs Licensed by the Society at the Source"; see subparagraph 5J of the license).

(e) In the event that the station adopts a method of accounting which allocates a disproportionate share of the station's revenues to announcements broadcast in the station breaks immediately preceding its locally produced remote programs, or to announcements broadcast in the station breaks immediately preceding its other live programs, the Society may elect to disregard the method of accounting used by the station and to divide the revenues for such announcements equally between the programs preceding the announcements and the programs following them.

(f) Election of Method of Reporting:

(i) The station may elect to compute its accountings to the Society using the optional standard deduction method of reporting by giving the Society written notice of such election within sixty days after approval of this agreement by the Court, or forty days after transmittal by the Society to the station of two copies of the approved agreement for execution by the station, whichever is later.

(ii) Each station shall have one option to change its method of computing its accountings to the Society effective January 1 of any of the calendar years 1970 through 1973

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by giving the Society notice in writing of such election not less than one year in advance of the calendar years to which such election relates.

(iii) If this agreement is renewed for the period January 1, 1974 through December 31, 1977 pursuant to the provisions of paragraph 10 of the license, each station may elect to change its method of computing its accountings to the Society effective January 1, 1974 by giving the Society not less than ninety days advance written notice of such election.

(iv) If this agreement is renewed for the period January 1, 1974 through December 31, 1977 pursuant to the provisions of paragraph 10 of the license, each station shall have one option to change its method of computing its accountings to the Society effective January 1 of any of the calendar years 1975 through 1977 by giving the Society notice in writing of such election not less than one year in advance of the calendar years to which such election relates.

(g) The forms for reporting under the optional standard deduction method are attached as Schedule I (for use by Network Affiliates) and Schedule II (for use by Independent Stations). The forms for reporting on an itemized deduction basis are attached as Schedule III (for use by Network Affiliates) and Schedule IV (for use by Independent Stations).

10. *Audit Adjustments:* All audit adjustments are to be made using the division between basic net receipts and increment applicable to the year to which the adjustment relates. For the purpose of computing the basic net receipts or any increment, audit adjustments are to be divided into four categories depending upon the period to which they relate:

(a) Adjustments applicable to the years before 1967 are not to be reflected in the basic net receipts or in the increment at all;

(b) Audit adjustments for the year 1967 for stations whose net receipts from sponsors after deductions for prior years are included in the basic net receipts are to be considered part of the increment in the year in which paid, provided that they are paid within 120 days (or if the Society so elects, in any instance, 180 days) after a notice of deficiency given pursuant to this agreement has been sent by the Society;

(c) Audit adjustments for 1968 and subsequent years are to be reflected in the increment in the year in which they are paid, but only if the station's net receipts from sponsors after deductions were included in the basic net receipts applicable to the year to which the adjustment relates;

(d) For stations whose net receipts from sponsors after deductions are not included in the basic net receipts applicable to the year 1968, any audit adjustment which relates to the year for which the station's net receipts from sponsors after deductions are first added to the basic net receipts shall be reflected in computing the basic net receipts applicable to the year in which the Society notifies the station of the adjustment.

11. *Late Payments:* Late payments of license fees are to be made using the division between basic net receipts and increment applicable to the year for which the license fees were due. If the payment is by a station whose net receipts from sponsors after deductions are included in the basic net receipts, and is of fees due for the years beginning 1968, the amount of the payment is to be reflected in any increment applicable to the year in which the payment is made. Otherwise, late payments are not to be reflected in the basic net receipts or in the increment at all.

12. *Adjustment of Payments for 1968 and 1969:* Within sixty days after approval of this agreement by the Court, or forty days after transmittal by the Society to the station of two copies of the approved agreement for execution by the station, whichever is later, the station shall submit to the Society a single revised report for the year 1968 and a single revised report for the completed months of 1969, computed in accordance with the terms of this agreement. If the license fees for such periods payable under this agreement, as reflected in the revised report forms, are greater than the amounts previously paid by such station for such periods, the station shall enclose such additional payment with the revised reports. If the license fees for such periods payable under this agreement, as reflected in the revised report forms, are less than the amounts previously paid by the station for such periods, the station shall deduct the amount of the difference from its next payment or payments to the Society.

Sincerely yours,

HERMAN FINKELSTEIN

STATEMENT OF ACCOUNT
AFFILIATED STATION
OPTIONAL STANDARD DEDUCTION

1. Gross Revenue (include all billings and bad debt recoveries)* [Lic. § 5D; Ltr. ¶s 1, 5]	\$	_____
2. Adjustments for Revenue Items:		
a. Add: Reportable Revenue not included in line 1 above [Lic. Par. 5D; Ltr. Pars. 1, 3, 4]	\$	_____
b. Deduct: Revenue not Reportable included in line 1 above [Ltr. Pars. 1, 3]		_____
3. Total Gross Revenue (Item 1 plus Item 2)	\$	_____
4. Less: Network Revenue:		
a. Revenue Received from Regular National Television Networks [Lic. § 2B; Ltr. ¶ 2]	\$	_____
b. Revenue Received from Occasional Networks Licensed by Society at the Source [Lic. ¶ 2F; Ltr. ¶ 2]		_____
c. Gross Revenue from Sale of Cooperative Programs [Lic. ¶ 5H]		_____
5. Total Gross Local Revenue (Item 3 less Item 4)	\$	_____
6. Less:		
a. Gross Political Revenue [Lic. ¶ 5I]	\$	_____
b. Bad Debts Written Off [Lic. ¶ 7C; Ltr. ¶ 5]		_____
c. Rate Card Discounts [Lic. ¶ 5D]		_____
d. Revenue from Local Programs Licensed by Society at the Source [Lic. ¶ 5J]		_____
7. Sub-Total (Item 5 less Item 6)	\$	_____
8. Less: Revenue Received from Occasional Networks Not Licensed at Source [Ltr. ¶s 2a, 9c]		_____
9. Balance Subject to Optional Standard Deduction (Item 7 less Item 8) ..	\$	_____
10. Less: Optional Standard Deduction [Ltr. ¶ 9]:		
a. Revenue Attributable to Remote Control and Live Programs [Ltr. ¶ 9a(i)]	@15%	\$ _____
b. Other Revenue [Ltr. ¶ 9a(ii)]	@10%	\$ _____
c. Total (not to exceed Item 9) ..		\$ _____
11. Total Revenue from Sale of Local Broadcasting Facilities (Item 7 less Item 10)	\$	_____
12. Less: Agency Commission Paid (not to exceed 15% of Item 11) [Lic. ¶ 5B]		_____
13. Net Receipts from Sponsors [Lic. ¶ 5B] (Item 11 less Item 12)	\$	_____
14. Less: 15% Sales Commission [Lic. ¶ 5C]		_____
15. Net Receipts from Sponsors after Deductions [Lic. ¶ 5D] (Item 13 less Item 14)	\$	_____
16. Commercial Fee [Lic. ¶s 5A2, 6D]:		
Station's Basic Net Receipts—		
% of Item 15	@2.0%	\$ _____
Station's Increment—		
% of Item 15	@1.0%	\$ _____
Total \$		\$ _____
17. Sustaining Fee [Lic. ¶ 5A1]		_____
18. Total Amount Due	\$	_____

* All revenue must be reported on this line including "total Sale of station time" (FCC Form 324, Schedule I, line 11) plus "total incidental broadcast revenues" (FCC Form 324, Schedule I, line 18) plus all commissions, if any, deducted in reporting these amounts.

Report for the period from _____ through _____

FOR ABCAP USE ONLY

Checked by _____
 Check Number _____
 Am't of Check \$ _____

Station _____ Located at: _____
 Operated by: _____
 (by) _____

SCHEDULE II

STATEMENT OF ACCOUNT
INDEPENDENT STATION
OPTIONAL STANDARD DEDUCTION

1. Gross Revenue (include all billings and bad debt recoveries)* [Lic. § 5D; Ltr. §§ 1, 5]		\$	_____
2. Adjustments for Revenue Items:			
a. Add: Reportable Revenue not included in line 1 above [Lic. Par. 5D; Ltr. Pars. 1, 3, 4]	\$	_____	
b. Deduct: Revenue not Reportable included in line 1 above [Ltr. Pars. 1, 3]		_____	
3. Total Gross Revenue (Item 1 plus Item 2)		\$	_____
4. Less: Network Revenue:			
a. Revenue Received from Regular National Television Networks [Lic. § 2E; Ltr. § 2]	\$	_____	
b. Revenue Received from Occasional Networks Licensed by Society at the Source [Lic. § 2F; Ltr. § 2]		_____	
c. Gross Revenue from Sale of Cooperative Programs [Lic. § 5H]		_____	
5. Total Gross Local Revenue (Item 3 less Item 4)		\$	_____
6. Less:			
a. Gross Political Revenue [Lic. § 5I]	\$	_____	
b. Bad Debts Written Off [Lic. § 7C; Ltr. § 5]		_____	
c. Rate Card Discounts [Lic. § 5D]		_____	
d. Revenue from Local Programs Licensed by Society at the Source [Lic. § 5J]		_____	
7. Sub-Total (Item 5 less Item 6)	\$	_____	
8. Less: Revenue Received from Occasional Networks Not Licensed at the Source [Ltr. §§ 2a, 9c]		_____	
9. Balance Subject to Optional Standard Deduction (Item 7 less Item 8)	\$	_____	
10. Less: Optional Standard Deduction [Ltr. § 9]:			
a. Revenue Attributable to Remote Programs [Ltr. § 9b(i)]	\$	_____ @ 37½%	
b. Revenue Attributable to Live Programs [Ltr. § 9b(ii)]	\$	_____ @ 32½%	
c. Revenue Attributable to Local Sale of Occasional Network Announcements [Ltr. § 9b(iii)]	\$	_____ @ 10%	
d. Other Revenue [Ltr. § 9b(iv)]	\$	_____ @ 25%	
e. Total (not to exceed Item 9)	\$	_____	
11. Total Revenue from Sale of Local Broadcasting Facilities (Item 7 less Item 10)		\$	_____
12. Less: Agency Commission Paid (not to exceed 15% of Item 11) [Lic. § 5B]		_____	
13. Net Receipts from Sponsors [Lic. § 5B] (Item 11 less Item 12)		\$	_____
14. Less: 15% Sales Commission [Lic. § 5C]		_____	
15. Net Receipts from Sponsors after Deductions [Lic. § 5D] (Item 13 less Item 14)		\$	_____
16. Commercial Fee [Lic. §§ 5A2, 6D]:			
Station's Basic Net Receipts—			
% of Item 15	\$	_____ @ 2.0%	
Station's Increment—			
% of Item 15	\$	_____ @ 1.0%	
Total	\$	_____	
17. Sustaining Fee [Lic. § 5A1]		_____	
18. Total Amount Due		\$	_____

* All revenue must be reported on this line including "total Sale of station time" (FCC Form 324, Schedule I, line 11) plus "total incidental broadcast revenues" (FCC Form 324, Schedule I, line 18) plus all commissions, if any, deducted in reporting these amounts.

Report for the period from _____ through _____

FOR ABCAP USE ONLY		Station _____ Located at: _____
Checked by _____		Operated by: _____
Clock Number _____		(by) _____
Am't of Check \$ _____		

STATEMENT OF ACCOUNT

AFFILIATED STATION
ITEMIZED DEDUCTIONS

1. Gross Revenue (include all billings and bad debt recoveries)* [Lic. § 5D; Ltr. ¶s 1, 5]	\$	_____
2. Adjustments for Revenue Items:		
a. Add: Reportable Revenue not included in line 1 above [Lic. Par. 5D; Ltr. Pars. 1, 3, 4]	\$	_____
b. Deduct: Revenue not Reportable included in line 1 above [Ltr. Pars. 1, 3]		_____
3. Total Gross Revenue (Item 1 plus Item 2)	\$	_____
4. Less: Network Revenue:		
a. Revenue Received from Regular National Television Networks [Lic. § 2E; Ltr. ¶ 2]	\$	_____
b. Revenue Received from Occasional Networks Licensed by Society at the Source [Lic. § 2F; Ltr. ¶ 2]		_____
c. Gross Revenue from Sale of Cooperative Programs [Lic. § 5H]		_____
5. Total Gross Local Revenue (Item 3 less Item 4)	\$	_____
6. Less:		
a. Gross Political Revenue [Lic. § 5I]	\$	_____
b. Bad Debts Written Off [Lic. § 7C; Ltr. ¶ 5]		_____
c. Rate Card Discounts [Lic. § 5D]		_____
d. Revenue from Local Programs Licensed by Society at the Source [Lic. § 5J]		_____
7. Sub-Total (Item 5 less Item 6)	\$	_____
8. Itemized Deductions:		
a. Film [Lic. § 5G1; Ltr. ¶ 6] ... (80% of \$ _____)	\$	_____
b. Talent [Lic. § 5G2; Ltr. ¶ 7]		_____
c. Broadcast Rights [Lic. § 5G3]		_____
d. Remote Lines [Lic. § 5G4]		_____
e. Prizes [Lic. § 5G5]		_____
f. Outside News Service [Lic. § 5G6] ... (80% of \$ _____)		_____
Total Itemized Deductions		_____
9. Total Revenue from the Sale of Local Broadcasting Facilities (Item 7 less Item 8)	\$	_____
10. Less: Agency Commission Paid (not to exceed 15% of Item 9) [Lic. § 5B]		_____
11. Net Receipts from Sponsors [Lic. § 5B] (Item 9 less Item 10)	\$	_____
12. Less: 15% Sales Commission [Lic. § 5C]		_____
13. Net Receipts from Sponsors after Deductions [Lic. § 5D] (Item 11 less Item 12)	\$	_____
14. Commercial Fee [Lic. ¶s 5A2, 6D]:		
Station's Basic Net Receipts— ____% of Item 13	\$ _____ @ 2.0%	_____
Station's Increment— ____% of Item 13	\$ _____ @ 1.0%	\$ _____
Total	\$ _____	
15. Sustaining Fee [Lic. § 5A1]		_____
16. Total Amount Due	\$	_____

* All revenue must be reported on this line including "total sale of station time" (PCC Form 324, Schedule I, line 11) plus "total incidental broadcast revenue" (PCC Form 324, Schedule I, line 18) plus all commissions, if any, deducted in reporting these amounts.

Report for the period from _____ through _____

FOR ABCAP USE ONLY

Checked by _____
Check Number _____
Am't of Check \$ _____

Station _____ Located at: _____
Operated by: _____
(by) _____

SCHEDULE IV

STATEMENT OF ACCOUNT

INDEPENDENT STATION
ITEMIZED DEDUCTIONS

1. Gross Revenue (include all billings and bad debt recoveries)* [Lic. ¶ 5D; Ltr. ¶s 1, 5]	\$ _____
2. Adjustments for Revenue Items:	
a. Add: Reportable Revenue not included in line 1 above [Lic. Par. 5D; Ltr. Pars. 1, 3, 4]	\$ _____
b. Deduct: Revenue not Reportable included in line 1 above [Ltr. Pars. 1, 3]	\$ _____
3. Total Gross Revenue (Item 1 plus Item 2)	\$ _____
4. Less: Network Revenue:	
a. Revenue Received from Regular National Television Networks [Lic. ¶ 2E; Ltr. ¶ 2]	\$ _____
b. Revenue Received from Occasional Networks Licensed by Society at the Source [Lic. ¶ 2F; Ltr. ¶ 2]	\$ _____
c. Gross Revenue from Sale of Cooperative Programs [Lic. ¶ 5H]	\$ _____
5. Total Gross Local Revenue (Item 3 less Item 4)	\$ _____
6. Less:	
a. Gross Political Revenue [Lic. ¶ 5I]	\$ _____
b. Bad Debts Written Off [Lic. ¶ 7C; Ltr. ¶ 5]	\$ _____
c. Rate Card Discounts [Lic. ¶ 5D]	\$ _____
d. Revenue from Local Programs Licensed by Society at the Source [Lic. ¶ 5J]	\$ _____
7. Sub-Total (Item 5 less Item 6)	\$ _____
8. Itemized Deductions:	
a. Film [Lic. ¶ 5G1; Ltr. ¶ 6] ... (80% of \$ _____)	\$ _____
b. Talent [Lic. ¶ 5G2; Ltr. ¶ 7]	\$ _____
c. Broadcast Rights [Lic. ¶ 5G3]	\$ _____
d. Remote Lines [Lic. ¶ 5G4]	\$ _____
e. Prizes [Lic. ¶ 5G5]	\$ _____
f. Outside News Service [Lic. ¶ 5G6] ... (80% of \$ _____)	\$ _____
g. 5% of Revenue Attributable to Locally Produced Remote Programs [Ltr. ¶ 8] ... (5% of \$ _____)	\$ _____
Total Itemized Deductions	\$ _____
9. Total Revenue from the Sale of Local Broadcasting Facilities (Item 7 less Item 8)	\$ _____
10. Less: Agency Commission Paid (not to exceed 15% of Item 9) [Lic. ¶ 5B]	\$ _____
11. Net Receipts from Sponsors [Lic. ¶ 5B] (Item 9 less Item 10)	\$ _____
12. Less: 20% Sales Commission [Lic. ¶ 5C]	\$ _____
13. Net Receipts from Sponsors after Deductions [Lic. ¶ 5D] (Item 11 less Item 12)	\$ _____
14. Commercial Fee [Lic. ¶s 5A2, 6D]:	
Station's Basic Net Receipts— _____ % of Item 13 \$ _____ @ 2.0%	\$ _____
Station's Increment— _____ % of Item 13 \$ _____ @ 1.0%	\$ _____
Total \$ _____	\$ _____
15. Sustaining Fee [Lic. ¶ 5A1]	\$ _____
16. Total Amount Due	\$ _____

* All revenue must be reported on this line including "total Sale of station time" (FCC Form 324, Schedule I, line 11) plus "total incidental broadcast revenues" (FCC Form 324, Schedule I, line 18) plus all commissions, if any, deducted in reporting these amounts.

Report for the period from _____ through _____

FOR ABCAP USE ONLY

Checked by: _____

Check Number: _____

Am't of Check \$: _____

Station: _____ Located at: _____

Operated by: _____

(by) _____

ASCAP'S ANSWER TO QUESTION TO HAL DAVID

POSED BY SENATOR CHARLES MATHIAS

Q. Your organization has been involved in considerable litigation with the broadcasters. In the Buffalo Broadcasting case the court found that your current licensing system did not violate the antitrust laws. Could you explain to the committee how you negotiate fees for your licenses with broadcasters?

A. Since the 1930s, ASCAP has negotiated fees for local radio stations, principally with a series of All-Industry Radio Station Music License Committees appointed by the National Association of Broadcasters, representing all stations, both independents and network affiliates, of all sizes from all over the country. Each radio negotiation has tended to focus on changed conditions since the prior agreement was made.

Since 1949, similar fee-bearing licenses for television have been negotiated with All-Industry Television Station Music License Committees. The original 1949 fee was the radio rate plus 10% (2.5% of net revenues). In 1954, that fee was reduced to the radio rate minus 10% (2.05%). In 1957, that fee was renewed through 1961. In 1969, after eight years of litigation and negotiation, the present formula (which now produces an effective rate of 1.15%) was adopted. In 1973, the Committee chose to continue that formula for an additional four years; and since 1978 has sought first litigation and now legislation instead of negotiations.

To describe the negotiating process, we can do no better than adopt the following language, taken from the Television Committee's 1969 Memorandum to All Television Stations (attached):

"After eight years of hard labor we have finally worked out a new agreement... a good agreement...

It is rare in a negotiation to get everything you want. We did not here. We did, however, make considerable progress...We are convinced that it is the best agreement that could be negotiated under the circumstances, and the result was preferable to going to court at this time.

In the negotiation, all segments of the industry were represented...big markets and small markets, independents and affiliated stations...

The proposed agreement has to be bought as a total package. That is the way it was negotiated..."

To show how carefully the agreements were negotiated, I attach copies of the prior agreement (for the term ending December 31, 1961) and the new agreement (worked out in 1969). Note that the license fee provision (Paragraph "5" in both agreements) has been substantially expanded, and that the new agreement has a carefully negotiated 15-page letter of interpretation annexed to and made part of the agreement.

ASCAP'S ANSWERS TO QUESTIONS TO OPPONENTS
POSED BY SENATOR MATHIAS

Q.1. Only a small percentage of your membership receives any funds from the pool of music license fees paid by broadcast television stations. Could you explain why?

A.1. In 1984 about 25% of ASCAP's writer members received some royalty distribution based on local television performances. That is not a small percentage when one considers that many ASCAP writer members are not truly full-time professional composers. ASCAP admits to membership any writer who has had one composition published or recorded. Most do not write for television and very few have ever had a hit song. The situation in music is not unlike the situation in golf: only a very small percentage of duffers ever improve sufficiently to make the PGA tour.

Q.2. The proponents of this legislation have noted that a large percentage of fees paid under the blanket license go to the producers of the television programs through music publishing subsidiaries. Could you explain to the committee how this works? Would passage of S. 1980 reduce the fees paid to these music subsidiaries? Would it affect the payments received by composers?

A.2. ASCAP is an unincorporated membership association which is owned and operated jointly by writers and publishers. The arrangement among them calls for royalties to be divided one-half to writers and one-half to publishers. Writers often receive part or all of the publisher's share, but publishers can never receive any part of the writer's share. These arrangements recognize the contributions made by both classes of mem-

ber. Contrary to the impression the broadcasters seek to create--that virtually all music in television is created specifically for a television program--there are many pre-existing compositions, used in syndicated programs, frequently well-known standards.

Even music written specifically for a TV program, unlike any other ingredient in that television program, may have, and often does have, a separate life apart from the program. There is no reason why publishers who successfully promote such music should not be rewarded. The broadcasters' real complaint is not that studios benefit but that they pay too much for music. The present system assures that they will never pay more than a reasonable fee. How writers and publishers choose to apportion the proceeds of the reasonable fees ASCAP collects should not, I believe, concern the broadcasters any more than ASCAP should be concerned with the salaries the broadcasters pay themselves and their family members.

S. 1980 does nothing to impair the power of producers to collect music performance fees through their publishing subsidiaries. It does, however, weaken the position of the Composer.

ASCAP's survey and distribution procedures are carried on under the watchful eyes of a federal Court, Court-appointed Advisors and the Department of Justice. Membership is open to all and among ASCAP's largest and most successful publishers are companies owned by broadcasters.

S.1980 does not address the question of how performing rights fees are divided between the composers and publishers. It contemplates that such fees will be paid to the publishers and composers by the producers and syndicators instead of ASCAP. Thus, the composer will no longer be assured of receiving at least 50%; he will no longer have a voice in the organization distributing these fees; and, where the program producer distributing the fee owns the music publisher (the situation most cited by the broadcasters), it is difficult to see how the com-

poser can be as well protected as he is today or how the percentage paid to those publishing subsidiaries will be reduced. The broadcasters have made clear their expectation that they will pay less for music under S.1980 leaving it to the production company to decide who gets cut back -- its publishing subsidiaries or the composer. It is not hard to guess.

Q.3. Aren't broadcasters who have a blanket license paying for access to a lot of material they will never use? Could you not lower the price by only licensing the specific music they want?

A.3. Broadcasters acquire licenses for a term of years. At the beginning of the license term, they do not know what music they will be performing or how often. Much of it has not even been created. No station has time to perform all of the compositions in the ASCAP repertory in the course of one year, but broadcasters have always demanded an indemnity against infringement claims with respect to all of the millions of works in the ASCAP repertory. To license only the specific music actually performed would require expensive recordkeeping by and checking on the more than 900 commercial television stations in the country.

However, those stations that wish to save money by controlling the use of music can do so now by using the per program license. That form of license grants the same access and the same indemnity as the blanket license. But it allows for savings if stations select syndicated programs all or most of which do not contain ASCAP music, and also avoid music in the ASCAP repertory on locally originated programs. It is important to remember that the blanket license reflects both parties' assessment of local TV music use, including the fact that many programs are non-musical and many do not contain any ASCAP music. Thus, the fee is set at a reasonable level for stations

that use relatively little music and becomes a great bargain for those that use a lot.

Q.4. According to your testimony, composers represented by your organizations stand to lose financially if S. 1980 is passed. What about the public. How will passage of this legislation affect the average TV-watching, music-loving citizen?

A.4. Passage of S. 1980 will deprive the public of a lot of original music which simply will never be created. This, we believe, is a necessary consequence of the economics of television program production. Producers, forced by the superior bargaining position of the broadcasters to absorb the added cost of music performance rights, would seek to reduce those costs by avoiding music altogether whenever they can, and by using the cheapest possible music when they must have some music. Now, they seek the music they think will most enhance their programs. Producers now pay only the minimal synchronization rights cost and the most talented composers are willing to work for very little and take the risk, with the producers, that they will be compensated if the programs are successful. The present system truly serves the purpose of the copyright law by encouraging authorship for the benefit of the public.

ASCAP'S ANSWERS TO QUESTIONS POSED BY
SENATOR DECONCINI

Q.1. In arguing against S. 1980 you state that this bill is simply an effort by one of two parties to a judicial proceeding to get Congress to overrule a negative judicial decision and in effect give that side the victory it was unable to legitimately obtain in the Courts. What is wrong with that? Isn't it inherent in our Constitutional system of separation of powers that if Americans don't agree with the Court's interpretation of the law, they can petition Congress to change it? It seems to me that much of the legislation we in the Senate consider is because someone is unhappy with the decisions of the Federal Courts (Habeas Corpus, Exclusionary Rule, NFL Bill, DeConcini-Moakley [unhappy with Executive Branch.]).

A.1. There is nothing wrong with Congress changing the law if Congress disagrees with a Court's interpretation of the law. That, however, is not what is involved here. The Buffalo Broadcasting case did not involve any interpretation of the copyright law.

That case merely held that the present method of licensing music is entirely lawful under the antitrust law. One of our arguments in opposition to S.1980 is that the proponents base their support for the bill on the very same assertions of fact that they were unable to prove in Court. S. 1980 would essentially utilize an amendment to the copyright law to grant antitrust relief for an abuse of market power that the Court found not to exist.

Q.2. In discussing enforcement under S. 1980, Senator Gore and Ralph Oman said that enforcement would be difficult because a composer or songwriter would not know when his works were being used.

This argument means that since we cannot determine when a television station uses copyrighted music, then we should make all television stations pay.

Doesn't the present system require that the stations which use very little music subsidize the stations which use a lot by requiring the same payment from them both?

A.2. The present system is one in which the stations bargain on an industry-wide basis. The fee, which applies to all stations, is a lowest common-denominator fee. The fee is reasonable for stations that use very little music and a very great bargain for those that use a lot. It is a practical system because the amount of music each station uses, and how it is used, varies widely during the license term. The fee would have to be much higher than it now is if it were dependent on the precise amount and type of music used. That would require far more record-keeping by stations and far more checking by licensing organizations.

Q.3. Doesn't the blanket license system create a significant barrier to entry for small independent stations, particularly those that serve a particular, narrow market such as Spanish language stations? If a Spanish language station uses very little ASCAP or BMI music, why should they pay for the same license as a station that relies on American produced syndicated television?

A.3. The blanket license system does not create any barrier for small independent stations such as Spanish language stations. Small stations pay low fees based on low net revenues. Spanish language stations use copyrighted music to at least the same degree as other stations. The ASCAP repertory includes the works of some forty foreign performing rights societies including the works of Hispanic composers residing in Spain and in

Latin America. However, a station convinced that it used ASCAP music on few or none of its programs could obtain a per-program license instead of a blanket license, or it could rely on direct licensing. No one is required to take a blanket license.

ASCAP'S ANSWERS TO QUESTIONS POSED BY SENATOR SPECTER

Q.1. I understand that theater owners currently receive films with all performance (as well as synchronization) rights to the music in those films already cleared and paid for. Why should the same rules not apply as well to local television station owners who may be receiving the very same film? Are there special considerations which must be applied in the case of T.V.?

A.1. The reason that theater owners currently receive films with music performance rights already cleared and paid for is that more than 40 years ago ASCAP was found to be in violation of the antitrust laws with respect to the licensing of music for films shown in motion picture theaters. The relief granted to the theater owners in the Alden-Rochelle case in 1948 was source licensing. The Alden-Rochelle judgment was vacated in 1950 when the Amended Final Judgment was entered in United States v. ASCAP. That Judgment required ASCAP or its members to license music at the source for motion picture theatrical performances in the United States, but did not extend source licensing to television.

ASCAP had not committed any antitrust violation against television broadcasters. The broadcasters wanted ASCAP blanket licenses to clear the music in all their programs including the music in old films as to which ownership of rights was often unclear.

Entirely different market mechanisms have grown up over the last 40 years in the television and movie markets. When films are licensed to theaters, producers receive a percentage of the box office, often a very high percentage. The arrangements differ in television where, in most markets, the stations are in a monopsony position. It cannot be too strongly emphasized that movie source licensing in the United States is

an anomaly resulting not from any copyright principle or policy, but from an old antitrust decision. It causes injury to creators who often must sell their music to producers for a pittance. My own song, "Raindrops Keep Falling on My Head" earned only \$7,500 from all the motion picture theatrical performances in the United States of "Butch Cassidy and the Sundance Kid". Considering the special contribution that song made to that film, and the enormous success of both, a very cruel injustice would have resulted if I had been forced to license "Raindrops" at the source not only for movies but also for television.

As I testified in response to one of your questions, I am glad that I wrote "Raindrops" not only because of the pleasure it has brought to many people, but because it earned substantial sums from other American media and from foreign movie theater performances. But why should it not also have earned a fair share from American movie theater performances?

Q.2. The numbers which have been quoted emphasize that only about one thousand composers--no doubt the most widely known, and most highly compensated--receive the vast majority of the royalties from ASCAP and BMI for TV music under the present system. Is that situation helpful to the vast proportion of composers remaining? Would the unknown, struggling composer be better or worse off under the proposed legislation?

A.2. The unknown, struggling composer is always in a difficult position, but the proposed legislation would make it worse. Under the present system, if such a composer were to have an opportunity to write for television and the work and program were successful, he would be well compensated. Indeed, he would be better compensated than a famous composer who wrote for a program that never got into syndication. That unknown composer

today thus has a vital interest in fair compensation arrangements for those better-known composers whose works are heard regularly on television. By way of analogy, there are many golfers, most of us weekend duffers. Few golfers make the PGA tour; but everyone has a chance, depending on his or her talents. The same is true in the music world today.

The proposed legislation would change all that. It would significantly reduce the use of copyrighted music in syndicated programs to the detriment not only of all composers, known and unknown, but also the public. TV producers required by source licensing to pay for music performing rights themselves will be unlikely to take a chance on the unknown composer, less likely to include as much new music by any composer, and even still less likely to offer an unknown composer a residual arrangement that would assure him of the continual payment for continual performance that he receives under the present system.

ASCAP'S ANSWERS TO QUESTIONS POSED BY SENATOR LAXALT

Q.1. Is the blanket license fee based on a station's gross revenues, net revenues, or "adjusted gross" revenues? If based on "adjusted gross," what are the "adjustments"?

A.1. The license fees are computed on the basis of the stations "net receipts from sponsors after deductions" as that term is defined in the license agreement. A copy of the local station blanket license agreement is attached. Also attached is a copy of the Music License Reporting and Payment Manual for local television stations prepared in 1969 by the All-Industry Television Station Music License Committee. The method of accounting is chosen by the station. There are four different forms which appear at pages 12, 22, 24 and 30 of the Manual. There are two forms each for affiliated stations and for independent stations. Each station has a choice between reporting on the "Optional Standard Deduction" or on the "Itemized Deductions" basis. The reporting forms indicate the kinds of revenue that must be accounted for and may be excluded, together with the kinds of deductions which are permitted.

Q.2. It is my understanding that the "per program" license fee is based on a percentage of revenues derived from the particular program, and that this license clears music performing rights for all of ASCAP or BMI repertory. Isn't this just another form of blanket license?

A.2. "Yes", in terms of the access granted, "No", in terms of the license fee. The per program license is exactly the same as the blanket license in granting access to and indemnification for the entire ASCAP repertory. The difference in the two forms of agreement is solely the manner in which the license

fee is computed. Under the blanket license, the fee is a percentage of all of the station's net local revenues.

The per program license fee, on the other hand, is a percentage of revenues derived only from those programs which do contain one or more compositions in the ASCAP repertory, but only if the right to perform the ASCAP compositions has not been obtained either directly from the ASCAP members involved or from the producer by means of a source license.

Accordingly, the per program license may be thought of as a blanket license with numerous "carve-outs". Carved out from the revenue base to which the per program license rate applies are all revenues from programs containing no music in the ASCAP repertory, and programs containing music in the ASCAP repertory where rights to perform that music have been obtained outside of ASCAP.

Q.3. If S. 1980 is enacted, will a TV station still need a blanket license? If so, would you expect there to be a carve-out for programs licensed at the source?

A.3. S. 1980 would effectively abolish the blanket license for local television. It would outlaw such a license for syndicated programs. Stations would then need music licenses, if at all, only for their non-musical locally-originated programs--news, weather, sports and public affairs. They would not opt for blanket licenses for such programs. Their witness so testified in the House Hearings on March 19, 1986.

Q.4. Please respond to the broadcasters' argument that ASCAP has always maintained that the per program license was never intended to be for the "run of the mill" television station.

A.4. The local television industry and ASCAP have always agreed that the per program license was not intended for the

run of the mill station and that the license fees they have agreed upon have always contemplated that the blanket license would be preferable from an economic standpoint to the per program license for the typical television station. Only a station that took pains to use much less ASCAP music than other stations use, or acquired direct or source licenses and thus avoided payment of fees under the per program license, would save money under that form of license. Historically, there has never been any such station. Indeed, so overwhelming has been the industry's interest in the blanket license, and so slight its real interest in the per program license, that in the last negotiation the All-Industry Television Station Music License Committee explicitly reported to the industry that it had not even sought to change the per program license because it viewed its job to be getting the cheapest possible blanket license.

ASCAP'S ANSWERS TO QUESTIONS
POSED BY SENATOR THURMOND

Q.1. Is there anything about S. 1980 that would prevent the studios from paying ASCAP for the license to all or part of the music available from the Society and then passing on the right and the cost to the broadcaster as part of their negotiations?

A.1. Not in so many words. But, S. 1980, as described by its broadcaster-proponents, does not contemplate that ASCAP would license studios at all--the proponents say that S. 1980 is intended to compel ASCAP's members, not ASCAP, to license producers (or syndicators). The producers assert that, if they paid for performing rights, they could not pass the cost on to the broadcasters, and would be forced to either absorb that cost or to sharply reduce or eliminate it by paying little or nothing for those rights. The reason they give is that in most markets there are only a few station buyers, and many program sellers, and the stations are thus able to exercise monopsony power.

Q. 2. You stated that broadcasters already have alternatives to blanket licenses, including per-program licenses. Could you tell the Subcommittee how many per-program licenses ASCAP currently issues to television stations?

A.2. ASCAP can issue a per-program license only if a station asks. Some two hundred radio stations have asked and been issued per program licenses. No television station has requested a per-program license.

Q.3. Apparently, broadcasters object to the current system. If per-program licenses are a serious alternative, why doesn't ASCAP issue more of them?

A.3. Only because the stations have not asked us for per-program licenses. In the last real negotiation concluded in

1969, they deliberately chose not to negotiate new per-program terms, preferring instead to work out a much cheaper blanket license. As they themselves put it in 1969: "The Music Committee did not negotiate with ASCAP for a new per program license, it being our opinion that the critical matter at this time was to get the best possible blanket license." They have, consistently used the tactic of claiming interest in the per-program license solely as a bargaining tactic to seek more favorable blanket licenses.

Q.4. What are the payments currently requested by ASCAP for a blanket license for TV and for a per-program license?

A.4. All 1969 licenses have expired, and having lost the Buffalo Broadcasting case, the stations are currently in Court under the ASCAP Consent Decree seeking Court determination of reasonable license fees. The blanket and per-program license fees that ASCAP deems reasonable in these proceedings are set forth in the letter dated August 16, 1985 from ASCAP's counsel to counsel for the stations and marked "Attachment 1". ASCAP has the burden of proving these fees reasonable. A trial is scheduled to begin on October 27, 1986. The broadcasters have thus far refused to negotiate on these fees having instead devoted their energies to lobbying for S. 1980 and H.R. 3521.

Q.5. Has ASCAP ever negotiated special arrangements with an individual station which are different from the rates you have discussed? If not, why not?

A.5. Prior to 1985, so far as I know, no station had ever asked for a special arrangement. ASCAP and the television industry always dealt with each other on an industry-wide basis. Until Mr. Bostick filed his current application, I am not aware of any station ever claiming to be different from all other

stations represented by the All-Industry Television Station Music License Committee. One of the provisions of the Amended Final Judgment in United States v. ASCAP prohibits license fee discrimination by ASCAP among similarly situated users. Such discrimination among stations is avoided by industry-wide dealing in which all stations are represented, directly or indirectly, by their All-Industry Committee.

How these negotiations are conducted is indicated by two memoranda mailed on May 26, 1969, one to stations that were Petitioners in Court and the other to non-Petitioners, both stressing that "(i)n the negotiation, all segments of the industry were represented...big markets and small markets, independents and affiliated stations." These memoranda are marked "Attachment 2."

After the last industry wide agreements had been approved by the Court in 1969, the All-Industry Committee prepared a "Music License Reporting and Payment Manual for Local Television Stations." which states in the penultimate paragraph on Page 2:

"The Committee believes that equitable treatment for all Stations requires a single set of rules and a clear understanding as to just what those rules are, particularly since the rate for the whole industry is affected by the reports of each Station." (emphasis added)

A copy of the manual is annexed as "Attachment 3."

The Committee also expressly stated that it did not seek to negotiate changes in the per-program license, preferring to seek "the best possible blanket license". (¶VIII (b) of the Memorandum headed "Proposed New Blanket License Agreement Between ASCAP and Television Stations", part of "Attachment 2.")

Q.6. Testimony was offered at the hearing that it is producer/publishers who benefit most from the current system.

What justification is there for returning 50 cents on every dollar you collect to the studio/publisher and not the composer?

A.6. ASCAP is an unincorporated membership association which is owned and operated jointly by writers and publishers. The arrangement among them calls for royalties to be divided one-half to writers and one-half to publishers. Writers often receive part or all of the publisher's share, but publishers can never receive any part of the writer's share. These arrangements recognize the contributions made by both classes of member. Contrary to the impression the broadcasters seek to create--that virtually all music in television is created specifically for a television program--there are many pre-existing compositions used in syndicated programs, frequently well-known standards.

S. 1980 does nothing to impair the power of producers to collect music performance fees through their publishing subsidiaries. It does, however, weaken the position of the Composer.

ASCAP's survey and distribution procedures are carried on under the watchful eyes of a federal Court, Court-appointed Advisors and the Department of Justice. Membership is open to all and among ASCAP's largest and most successful publishers are companies owned by broadcasters.

Even music written specifically for a television program, unlike any other ingredient in that program, may have, and often does have, a separate life apart from the program. There is no reason why publishers who successfully promote such music should not be rewarded. The broadcasters' real complaint is not that studios benefit but that they pay too much for music. The present system assures that they will never pay more than a reasonable fee. How writers and publishers choose to apportion the proceeds of the reasonable fees ASCAP collects should not, I believe, concern the broadcasters any more than ASCAP should be

concerned with the salaries the broadcasters pay themselves and their family members.

Q.7. In a deposition in the Buffalo Broadcasting case you were asked whether you were adequately compensated for your music used in motion pictures. Your response was yes. Yet, movies are source licensed. What makes a movie different when it is on television than when it is shown in a theater?

A. 7. This question is based on an inaccurate premise. I never answered "Yes" to a question whether I was adequately compensated for my music used in motion pictures. A question was asked at the Buffalo trial as to whether I negotiated a flat payment with respect to music used in certain films including "Butch Cassidy and the Sundance Kid." The questions asked were as follows:

Q. And with respect to those particular negotiations, I take it that you feel that you were adequately compensated for the synchronization and theatrical performance rights when you wrote the music?

A. I guess so. I hadn't thought of it in those terms.

Q. But you would agree with me that you don't really have any complaints now?

A. No, I don't.

My testimony then, and in the Senate on April 9, 1986, is that I don't "now" have any complaint about my earnings from one of the most successful songs written in the last 20 years, "Raindrops Keep Falling on My Head." Clearly, the \$7,500 I was paid to write "Raindrops" was not adequate compensation for motion picture theatrical performances of that work in the United States. But I have no complaint "now" in view of the

substantial earnings of that song over the years from other media. If all I had earned was the \$7500--a wholly inadequate sum for motion picture theatrical performances in the United States--that would have been entirely unjust. Because I earned substantial sums from foreign motion picture theatrical performances and from United States performances in radio, television and other media, I would appear ungrateful if I were to complain about having written the song for the film. However, I was "adequately compensated" only because of payments made by other commercial users, not because of the \$7500 I received from the producer. The way performing rights are licensed for motion picture theatrical performances in the United States is grossly unfair.

A movie shown on television is different from the same movie shown in theaters. The most obvious difference is the commercial interruptions which signify the difference in the markets in which the movie is exhibited. When producers license theaters, they receive a percentage of the box office. They do not receive a percentage of a station's advertising revenues. To import into television the unjust theatrical system which resulted from antitrust violations more than 40 years ago--violations long since cured-- would be to stand justice on its head.

Q.9. (sic.) How much of the money collected by your organization goes toward payment of your administrative costs?

A.9. Approximately 82¢ of every dollar collected by ASCAP is distributed to writers and publishers and to foreign societies. The remainder, representing administrative costs, goes mainly to the expense involved in monitoring performances and license compliance, in distributing royalties, in licensing users and in collecting fees.

Attachment 1

Cable Address ASCAP New York
TWX 7105812084American Society of Composers, Authors and Publishers
ASCAP Building - One Lincoln Plaza, New York, N.Y. 10023 Area Code (212) 595-3050Bernard Korman
General Counsel

212-870-7510

August 16, 1985

R. Bruce Rich, Esq.
Messrs. Weil, Gotshal & Manges
767 Fifth Avenue
New York, N. Y. 10153

Re: United States v. ASCAP--Applications of
Buffalo Broadcasting Co., Inc., et al. and
KWTX Broadcasting Co., Inc.

Dear Bruce:

Enclosed are ASCAP's license fee proposals for blanket and per program local television station licenses for the term November 16, 1984, through March 31, 1988.

These proposals contain the essential license fee terms. They also indicate changes from prior agreements. As to other license agreement terms and conditions not explicitly covered by the proposal, the Society is prepared generally to follow the terms of the prior agreement negotiated with your committee. We shall, of course, be happy to discuss any proposal for simplification.

We look forward to discussing our proposals at the next negotiating session which Hal David and Les Arries are trying to schedule for early next month.

With respect to the question of an interim per program license, although ASCAP has had virtually no experience with per program licenses in television, we are willing to make interim per program licenses available for stations wishing to hold that form of license on the terms and conditions set forth in the enclosed per program proposal.

The Society reserves the right to modify its proposal, or to seek changes in any interim fee arrangements, based on matters that may be developed in pretrial discovery or on experience during the interim period.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bernard Korman".

Bernard Korman

Enclosure

cc: Honorable Michael H. Dolinger

Proposal--Local Station Blanket License

[Shenandoah blanket license means the Local Station Blanket Television License Agreement for the period January 1, 1968, through December 31, 1977.]

1. The commercial fee shall be 1.42% of licensees' "net receipts from sponsors after deductions," as that term is defined in the Shenandoah blanket license (§ 5C).

2. The definition of "gross amount paid for the use of television broadcasting facilities of the station for LICENSEE's local television programs," appearing in the Shenandoah blanket license (§ 5D) shall be modified to include contributions from viewers.

3. Paragraph 6I of the Shenandoah blanket license shall be deleted.

4. Paragraph 5H of the Shenandoah blanket license shall be modified so as to provide that cooperative television programs shall be deemed to be local television programs, as defined in the Shenandoah blanket license.

5. There shall be a late payment charge of 1% per month.

Proposal--Local Station Per Program License

[Shenandoah blanket license means the local Station Blanket Television License Agreement for the period January 1, 1968, through December 31, 1977; Shenandoah per program license means the Local Station Per Program Television License Agreement for the period January 1, 1968, through December 31, 1977.]

1. The license shall recite that it is experimental and that the parties have agreed that none of its terms shall have any precedential effect in any negotiations or proceedings concerning any future per program license.

2. The fee for the license shall be 9% of the "revenue subject to fee."

The "revenue subject to fee" means "revenue per weighted hour" multiplied by the total number of "weighted hours" of "programs subject to fee."

"Programs subject to fee" means local television programs using any composition in the ASCAP repertory, except programs with compositions in the ASCAP repertory all of which have been licensed at the source in accordance with paragraph 4I of the Shenandoah per program license, as modified by paragraph 6 of this proposal.

"Revenue per weighted hour" means "net receipts from sponsors after deductions," (as that term is defined and modified in the accompanying Proposal for the blanket license for stations using the optional standard deduction method under the Shenandoah blanket license) for a full calendar year divided by the total number of "weighted hours" in the year.

"Weighted hours" means the total number of hours of local television programs during a reporting period in each of the following time periods multiplied by the applicable weight set forth below:

	Time Period	Applicable Weight
Weekdays:	7 AM -10 AM	30
	10 AM - 1 PM	40
	1 PM -4:30 PM	50
	4:30 PM -7:30 PM	75
	7:30 PM -11 PM	100
	11 PM - 1 AM	50
	1 AM - 7 AM	20
Weekends:	7 AM -10 AM	30
	10 AM - 1 PM	40
	1 PM - 4:30 PM	75
	4:30 PM - 7:30 PM	75
	7:30 PM -11 PM	100
	11 PM - 1 AM	50
	1 AM - 7 AM	20

3. The definition of "gross amount paid for the use of television broadcasting facilities of the station for LICENSEE's local television programs," appearing in the

Shenandoah per program license (§ 4D) shall be modified to include contributions from viewers.

4. Paragraph 4H of the Shenandoah per program license shall be deleted.

5. There shall be a late payment charge of 1% per month.

6. Paragraph 4I of the Shenandoah per program license shall be modified to provide that it shall apply to any program.

7. The licensee shall pay to ASCAP an administrative fee in an amount agreed upon by the parties, or fixed by the Court.

8. The music reporting requirements shall be substantially as provided in the Shenandoah per program license, except

(a) the licensee shall furnish to ASCAP each month a copy of the complete television log in the form previously required by the FCC; and

(b) if there is a cue sheet for a program and the cue sheet is furnished to ASCAP, or if ASCAP has the cue sheet for the program, no other music information need be furnished for that program.

9. The license shall be available, either on an interim or final basis, prospectively only.

ALL-INDUSTRY TELEVISION STATION MUSIC LICENSE COMMITTEE

MEMORANDUM

TO: All TV Stations Listed as Petitioners in the *Shenandoah* TV Music Proceeding

FROM: Chuck Tower, Chairman, All-Industry Television Station Music License Committee

SUBJECT: *The New ASCAP Agreement*

After eight years of hard labor we have finally worked out a new agreement with ASCAP. Your Music Committee believes that it is a good agreement. We strongly and unanimously recommend its approval by all television stations.

The new proposed blanket license should result in substantial savings for television stations over the next ten years. It is estimated that, if the industry grows at a rate of 6 per cent per year over the ten years of license, the savings (including retroactivity) will amount to approximately \$53 million. If the industry grows more rapidly, the savings will be larger.

Since you are listed as one of the petitioning stations, your approval of the Committee's work is necessary. Once the great bulk of petitioning stations have approved the agreement, it will be presented to Judge Ryan for approval as required by the ASCAP consent decree.

After reading the enclosed material, please send me a TWX or telegram indicating your approval and specifically authorizing our counsel, Barrett Knapp Smith & Schapiro, to consent on your behalf to the entry of an order approving the proposed agreement. This should be done as soon as possible but no later than noon on Friday, June 6, 1969. If you have any questions please call me. A hearing on the agreement will be held before Judge Ryan in Room 36 of the Federal Courthouse in Manhattan at 10:30 A.M. on June 24, 1969. After the hearing, assuming the agreement is approved, ASCAP will send license forms to the stations for signature.

The enclosed material includes:

1. An explanatory memo from me.
2. The proposed forms of blanket license (together with a supplemental letter), and per-program license.
3. The proposed form of court order.

It is rare in a negotiation to get everything you want. We did not here. We did, however, make considerable progress toward our goal of getting a fair rate for music. Moreover, we are convinced that it is the best agreement that could be negotiated under the circumstances, and the result was preferable to going to court at this time.

In the negotiation, all segments of the industry were represented . . . big markets and small markets, independents and affiliated stations. During the last three or four years Andy Murtha of Time-Life, Elisha Goldfarb of RKO General, and I have carried the negotiating load. Hamilton Shea of the Gilmore Stations and Bob Smith of WCYB in Bristol have played close support roles. The entire Music Committee was involved in all key decisions on both strategy and substance. The Committee's lawyers, Donald Schapiro and Michael O. Finkelstein, of the firm of Barrett Knapp Smith & Schapiro, made a major contribution throughout the negotiations.

The proposed agreement has to be bought as a total package. That is the way it was negotiated and that is the way it will be presented to Judge Ryan.

We would appreciate getting your approval and specific authorization to consent to an order approving the license just as soon as possible. Please wire or TWX me at Room 3800, 280 Park Avenue, New York, N. Y.

ALL-INDUSTRY TELEVISION STATION MUSIC LICENSE COMMITTEE
MEMORANDUM

TO: TV Stations Not Listed as Petitioners in the *Shenandoah* TV Music Proceeding
FROM: Chuck Tower, Chairman, All-Industry Television Station Music License Committee
SUBJECT: *The New ASCAP Agreement*

After eight years of hard labor we have finally worked out a new agreement with ASCAP. Your Music Committee believes that it is a good agreement.

The new proposed blanket license should result in substantial savings for television stations over the next ten years. It is estimated that, if the industry grows at a rate of 6 per cent per year over the ten years of license, the savings (including retroactivity) will amount to approximately \$53 million. If the industry grows more rapidly, the savings will be larger.

You were not listed as a petitioner at the time this proceeding began in 1961. Thus, the enclosed material is being sent to you for information purposes only. It includes:

1. An explanatory memo from me.
2. The proposed forms of blanket license (together with a supplemental letter) and per-program license.
3. The proposed form of court order.

A hearing on the agreement will be held before Judge Ryan in Room 36 of the Federal Courthouse in Manhattan at 10:30 A.M. on June 24, 1969. After the hearing, assuming the agreement is approved, ASCAP will send license forms to the stations for signature.

It is rare in a negotiation to get everything you want. We did not here. We did, however, make considerable progress toward our goal of getting a fair rate for music. Moreover, we are convinced that it is the best agreement that could be negotiated under the circumstances, and the result was preferable to going to court at this time.

In the negotiation, all segments of the industry were represented . . . big markets and small markets, independents and affiliated stations. During the last three or four years Andy Murtha of Time-Life, Elisha Goldfarb of RKO General, and I have carried the negotiating load. Ham Shea of the Gilmore Stations and Bob Smith of WCYB in Bristol have played close support roles. The entire Music Committee was involved in all key decisions on both strategy and substance.

PROPOSED NEW BLANKET LICENSE AGREEMENT BETWEEN ASCAP AND TELEVISION STATIONS

Explanatory Statement

Every station should read the enclosed proposed agreement which consists of a license and a supplemental letter. Because the agreement is complicated, we have summarized and then explained the key points below. It may help you to read the summary and explanation first and then to examine the reporting form schedules which appear at the end of the letter before going on to the agreement itself. We urge you not to rely solely on the summary as there may be details in the full agreement which will be of particular importance for your station.

I. Summary of Key Facts

The present contract . . . has a commercial rate of 2.05% and a sustaining fee of the highest quarter hour rate each month.

The Music Committee's negotiating objective . . . was a substantial reduction in the present payments, believing as we did that this was the appropriate time to get such a reduction. If we could have written our own ticket, we would have written a 1.0% rate. This was not attainable in negotiations nor, given the hazards and difficulties of litigation, would we have been justified in acting on the assumption that the court would have upheld our position.

The new contract . . . does give us a 1.0% rate on revenue above the industry average for 1964-1965 with a 2.0% rate on the base. The computation is made on an industry-wide rather than a per-station basis.

The deductions permitted by the new contract . . . are much clearer than in the old and an optional standard deduction is permitted. Some stations will save money on the deductions, but not all, depending on past deduction practice.

Network affiliated and independent stations . . . are treated somewhat differently in terms of the deductions allowed, a difference which has not existed in the past.

The sustaining fee . . . is reduced by 30% and thereafter, for most stations, will be the same percentage of the commercial fee as it was after the reduction for the year 1963.

The effective date of the new contract . . . will for most purposes be January 1, 1968. It will run for a term of ten years unless either party elects not to renew at the end of six years.

Retroactivity . . . the 30% reduction in sustaining fee and the rate of 2.00% instead of 2.05% are effective as of January 1, 1964. The 2.0-1.0% stairstep formula applies as of January 1, 1966. All other terms of the new license are effective January 1, 1968.

II. Commercial Fee

The new commercial fee is 2.0% on a revenue base which consists of the average industry revenue for the two years 1964 and 1965. Revenue above that base figure is subject to a 1.0% rate. Each station shall divide its revenue between increment and base in accordance with over-all industry figures which will be furnished each year. Obviously the greater the industry's revenue growth the greater the share of each station's revenue that will be subject to the 1.0% rate.

Each station must report all revenue not cleared at the source, including local and national time and program sales, except revenue relating to certain types of trade deals (Letter, ¶3). Deductions may then be taken for:

- (a) revenue from regularly constituted national networks (including revenue attributable to network co-op programs) (License, ¶s 5D and 5H);
- (b) political broadcast revenue (License, ¶6I); and
- (c) certain expense items which are permitted as under the present contract. However, with respect to such items, stations are given the option of using either a standard deduction or an itemized deduction based on actual costs. Because of higher program costs, independent stations are permitted somewhat larger deductions than affiliated stations. (See paragraphs III and IV on the following page for details.)

Deductions—Affiliated Stations

Each station has an option either to itemize deductions or to use a standard deduction based on percentages of its revenue. The election must be made shortly after the license is executed and thereafter may only be changed once prior to 1974, once at the beginning of 1974, and once during the period 1974-1977 (Letter, ¶9(f)).

Most affiliated stations will probably choose the standard deduction formula. It is simpler than itemizing deductions and will probably save money. Of course, the only way to be sure is to do the arithmetic both ways with a representative group of figures.

The standard deduction for affiliated stations . . . is 15% of revenue attributable to a station's locally produced remote programs and live programs, and 10% of all other local revenue (including network adjacency revenue). For these purposes, all revenue from the sale of time, announcements within, and announcements immediately preceding remote and live programs, is deemed attributable to such programs (Letter, ¶9(a)).

The itemized deductions permitted for affiliated stations are:

1. 80% of film or video tape costs (amortized over the life of the contract on a straight-line basis, or on any other basis allowed by the Internal Revenue Service) (License, ¶5G(1) and Letter, ¶6);
2. Salary and talent fees of on-the-air talent engaged for particular programs and talent fees paid to staff announcers and others within certain limits (License, ¶5G(2));
3. Rights costs for specific local programs or other special events (License, ¶5G(3));
4. Remote lines (License, ¶5G(4));
5. Prizes to participants on a program (License, ¶5G(5)); and
6. 80% of the payments made for news service (License, ¶5G(6)).

An affiliated station may deduct actual agency commissions paid not to exceed 15% of total revenue from the sale of broadcasting facilities after all program deductions, the remaining amount being "Net Receipts from Sponsors" (License, ¶5B). Sales commissions equal to a flat 15% of "Net Receipts from Sponsors" may then be deducted, the remaining amount on which the fee is paid being "Net Receipts from Sponsors After Deductions" (License, ¶5C).

IV. Deductions—Independent Stations

The optional standard deduction for independent stations provides larger percentages than the optional standard deduction for affiliated stations, reflecting the larger program costs of independent stations.

An independent station electing the optional standard deduction may deduct 37½% of revenue attributable to locally produced remote programs; 32½% of revenue attributable to other live programs; 10% of revenue from sales by the station of announcements broadcast before or within programs of an occasional television network not licensed by the Society at the source; and 25% of all other revenue (Letter, ¶9(b)).

The itemized deductions for independent stations are the same as those for affiliated stations except that an independent station itemizing deductions may deduct an additional amount equal to 5% of revenue attributable to locally produced remote programs (Letter, ¶8).

An independent station is entitled to the same 15% deductions for agency commissions and sales commissions as an affiliated station, except that an independent station itemizing deductions is entitled to a 20% deduction for sales commissions.

V. Sustaining Fee

The present sustaining fee is a monthly payment equal to a station's highest quarter-hour rate. The new contract provides for a 30% reduction in the sustaining rate and a somewhat different formula for computing it (License, ¶5A(1)). That formula is best described by showing the steps involved in the computation.

- (a) Take your highest quarter-hour rate as of 1/1/68. In order to avoid disputes over card rates, the agreement provides that if the quarter-hour rate was less than 37½% of the highest hour rate, the dollar figure should be raised to 37½% of the hour rate. If the highest quarter-hour rate was more than 42½% of the highest hour rate, it should be reduced to the 42½% level. If you did not at that time publish both a quarter-hour and an hour card rate for the highest priced time segment of your broadcast day, or if you had been broadcasting for less than three years, your sustaining fee shall be computed by reference to industry averages (License, ¶s 5A1a(3) and 5A1b).
- (b) Take 70% of the dollar figure computed in (a) above and multiply it by 12. This is your sustaining fee payable for 1968.

- (c) Determine the total commercial fee payable under the new license for 1968.
- (d) Divide the figure determined in "b" above by the figure determined in "c" above. The result will be a percentage. This percentage will be used throughout the life of the new contract to determine your sustaining fee. Each month you will simply multiply your commercial fee by this percentage and the result of that multiplication is the sustaining fee.

VI. Trade Deals

The proposed agreement provides that no accounting need be made to ASCAP with respect to:

- (a) *Film trades*: announcements broadcast by a station in exchange for films (Letter, ¶3(a));
- (b) *In store promotion*: announcements broadcast by a station in exchange for certain types of package promotion agreements with stores, commonly known as "teledyzing" or "merchandising" (Letter, ¶3(b)); and
- (c) *Radio-television cross promotion*: announcements broadcast by a television station as part of a cross promotion with a radio station or another television station (Letter, ¶3(c)).

All other trades, including announcements broadcast for a company affiliated with the station, are required to be reported (License, ¶5D and Letter, ¶4). A special arrangement has been made for cross promotion with newspapers. If the newspaper is affiliated in ownership with a station, cross promotion announcements broadcast by the station are to be reported at 50% of the run-of-schedule card rate; for unaffiliated newspapers announcements are to be reported at 100% of the run-of-schedule rate. A station also has an election to broadcast institutional announcements for ASCAP in lieu of accounting to ASCAP for newspaper trades (Letter, ¶3(d)).

VII. Retroactivity

The 30% reduction in sustaining fee and the rate of 2.00% instead of 2.05% are effective as of January 1, 1964. With respect to the commercial fee, the 2.0-1.0% stairstep formula applies as of January 1, 1966. All other terms of the new license are effective as of January 1, 1968 (Order, ¶1).

ASCAP shall pay not less than 60% of retroactivity on or before December 1, 1969; not less than 20% on or before December 1, 1970; and the balance on or before December 1, 1971. In the event that ASCAP fails to make such payments, the station may credit the amounts of retroactivity required to be paid by those dates against its next license payments. ASCAP may withhold up to 50% of retroactivity with respect to any station which "indisputably owes" license fees. In the event of a dispute, either party may apply to the federal district court in New York for a determination whether retroactivity was properly withheld (Order, ¶4).

Since the new agreement becomes effective as of January 1, 1968, most stations will be entitled to some refund for payments made under the interim order for 1968 and for the completed months of 1969. The amount of the refund must be computed shortly after the new license goes into effect and may be credited against the next payment or payments to ASCAP. If additional payments are required, they must be submitted with the next payment to ASCAP (Letter, ¶12).

VIII. Miscellaneous

(a) *Audit Disputes and Late Payments*. Payments made pursuant to adjustments shall be reflected in the increment in the year made, except that payments for years prior to 1967 shall not be reflected in industry statistics and payments for 1967 shall be reflected only if paid within a specified period of time after notice from ASCAP. Late payments, generally speaking, are to be included in industry statistics in the year in which made (Letter, ¶s 10, 11).

(b) *Per-Program License*. The negotiators for the Committee focused their efforts on obtaining the best possible blanket license and did not press for changes in the per-program license. We have agreed with ASCAP that the finding in the proposed order that the per-program license is reasonable shall not be relied on by either party for any purpose after the blanket license agreement terminates.

(c) *FCC Figures*. The Court's discovery order in the rate proceeding required petitioners to produce their FCC 324 forms covering a five-year period. The proposed agreement (Letter, ¶1) provides that during the term of the agreement stations shall make gross revenue information contained in Schedule I available to ASCAP (the station may do this in several different ways at its option) so that the FCC reported gross can be checked against the gross reported to ASCAP.

Music License Reporting And Payment Manual For Local Television Stations

**Blanket Music License Agreement With Ascapi
January 1, 1968—December 31, 1977**

**PREPARED BY
ALL-INDUSTRY TELEVISION STATION
MUSIC LICENSE COMMITTEE
OCTOBER, 1969**

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FOREWORD

This manual contains a detailed explanation of the new blanket music license agreement between local television Stations and Ascap.

The agreement was approved by the Federal District Court in Manhattan on July 28, 1969. The approval followed eight years of litigation and negotiation conducted on behalf of television Stations by the All-Industry Television Station Music License Committee. This manual has been prepared by the Committee to help television Stations operate more easily and more effectively under the new agreement.

The Committee's work during eight difficult years was guided by two convictions: that television Stations paid too much for the kind of music they used; and that, given prior history, it was essential in this negotiation to get a substantial reduction. Previous television settlements had been: in 1949, radio plus 10% (or a 2.50 commercial fee percentage); in 1953, radio minus 10% (or a 2.05 commercial fee percentage); and in 1957, no change.

The new contract provides for a 2.0 rate on the average of 1964-65 industry revenue and a 1.0 rate on revenue above that average plus a 30% reduction in sustaining fee. The Committee is satisfied that this constitutes a substantial reduction and that the 1.0 rate on increment represents a major breakthrough. Naturally, 1.0 on everything would have been even better and, in the minds of many, deserved. This was not achievable in negotiation nor, in the Committee's judgment, given the difficulties of litigation, would we have been justified in assuming that our position would have been upheld in court.

Because of the lower rate on incremental revenue, the dollar saving to the industry flowing from the new contract will depend on the growth of the industry. If the average growth of the industry from 1968 through 1977 is 6%, the average commercial rate for the ten-year period will be about 1.62 or 21% less than the 2.05 rate. The rate in the last year will be 1.48 or 28% less than the 2.05 rate. At an industry growth rate of 9% (the approximate average growth rate since 1960) the average commercial rate for the ten-year period will

be 1.52 or 26% less than the 2.05 rate. The rate in the last year will be 1.37 or 33% less than the 2.05 rate.

Individual Station savings in relation to the Ascap payments actually made during the last year or two will vary widely. This situation is caused by wide variations in the present practice of reporting revenues and in taking program cost deductions; such variations may be reduced but not necessarily eliminated when past disputes are settled.

In prior settlements there was no significant change in the language of the license or the reporting forms. The new contract not only changes the rate but modifies the language of the license and the method of computing the license fee.

Under the new contract, variations in reporting will be far less than before. The Committee believes that equitable treatment for all Stations requires a single set of rules and a clear understanding as to just what those rules are, particularly since the rate for the whole industry is affected by the reports of each Station.

Clarification of the rules has contributed significantly to the length and apparent complexity of the new contract. But the new agreement is not as complicated as it seems, and it should reduce or even eliminate audit problems. Once understood, it should not be significantly more difficult to administer than the old agreement.

HIGHLIGHTS OF THE AGREEMENT

The primary purpose of this manual is to provide detailed guidance for Station personnel who are responsible for preparing the television Station's monthly report to Ascaph. Hence, most of the manual is devoted to general instructions and a line-by-line explanation of the report forms. These instructions will be more readily understood if the reader has a perspective of the essential elements of the new contract, particularly as they compare with the old agreement. The highlights are set forth below. For specific definitions and details, refer to the general instructions which begin on p. 7 of this manual and the line-by-line explanation which follows.

The term of the new agreement . . . is from January 1, 1968, to December 31, 1977, but each Station and Ascaph have the right to terminate at the end of six years of the license, that is, on December 31, 1973.

The blanket license . . . is substantially changed by the new agreement, but the per program license has not been changed.

The new commercial rate for the blanket license . . . is 2.0 on an industry revenue base, which is the average of 1964-65 revenue after exclusions and deductions as reported to Ascaph, and 1.0 on incremental revenue above that base. This compares with a straight 2.05 rate in the old contract. The 2.0-1.0 stairstep rate is determined on an industry, not a per station, basis. Each year Stations will be given a ratio computed by Ascaph, verified by the independent accounting firm, Arthur Andersen & Co., and reviewed by the Committee which will indicate the proportion of the Station's net receipts from sponsors after deductions subject to the 2.0 rate and the proportion subject to the 1.0 rate. As the industry grows, the proportion subject to the lower rate will increase.

Revenue inclusions and exclusions in the new contract . . . are much more specific than in the old contract. Revenue consists of a Station's net receipts from sponsors from local programming, whether sold locally, regionally or nationally. Excluded are revenues from regular networks, political broadcasts, certain but not all trade deals, and revenue from nonbroadcast activities.

Cost deductions under the new contract . . . are handled quite differently and again far more specifically. First, both network affiliates and independent Stations may choose between an optional standard deduction and an itemized deduction. The optional standard deduction for affiliated Stations is 15% of gross revenue subject to the commercial fee attributable to local live programs and to remote programs and 10% of all other revenue subject to the commercial fee, excluding revenue received from occasional networks not licensed at the source by Ascaph. The optional standard deduction for independent Stations consists of the following percentages of gross revenue subject to the commercial fee: 37½% of revenue attributable to local remote programs; 32½% of revenue attributable to local live programs; 10% of revenue from Station's sale of announcements preceding or within programs of an occasional network not licensed at the source by Ascaph, and 25% of all other revenue subject to the commercial fee, excluding revenue received from occasional networks not licensed at the source by Ascaph. The itemized deduction is the same for affiliated and independent Stations and includes 80 per cent of film and news service costs, some talent costs, rights, and certain prizes. An independent Station that itemizes deductions may deduct 5% of its gross revenue attributable to its locally produced remote programs and is also entitled to deduct a 20% sales commission on net receipts from sponsors in lieu of the 15% deduction for sales commission allowed in all other cases.

The sustaining fee . . . is reduced by approximately 30 per cent. The method for computing the fee has been changed. The old contract used a Station's highest quarter hour rate each month. The new contract establishes the sustaining fee as a percentage of the commercial fee (based in most cases on the Station's 1968 data).

Reports to Ascaph . . . As under the old contract, monthly reports are to be filed with Ascaph. In addition, the new contract requires the filing each year of a final report for the preceding calendar year. This requirement is necessary because the monthly reports use an estimated allocation between basic net receipts and increment whereas the annual report will be based on the actual allocation. Separate forms are used depending on class of Station (network affiliate or independent) and method of deduction (itemized or optional standard). The new contract also provides for a cross-check between a Station's annual report to Ascaph and Schedule 1 of FCC Form 324.

CHECKLIST OF THINGS TO DO

Stations which have mailed signed contracts to Ascaph by October 6, 1969 are entitled to certain extensions of time for making elections and filing reports. The following is a schedule of the actions which these Stations must take under the new blanket license agreement.

Select method of cost deduction . . . by November 20, 1969. Each Station has a choice of using an itemized cost deduction or an optional standard percentage deduction. After making the initial choice, the Station can change the method of deduction three times during the life of the contract. See pp. 8-9 of this manual.

File a revised report for 1968 . . . by November 20, 1969. Since the new agreement is retroactive to January 1, 1968, a revised report must be filed for that year based on the new agreement. The estimated allocation between basic net receipts and increment to be used in filing this report is 80-20. Thus, 80 per cent of net receipts from sponsors after deductions will be subject to the 2.0 rate and the remaining 20 per cent to the 1.0 rate. Ascaph will recalculate fees for 1968 when the final allocation for 1968 is known and will advise Stations accordingly.

File a revised report for the first 9 months of 1969 . . . by November 20, 1969. Here again a recomputation based on the new contract is necessary. Use the 80-20 ratio between basic net receipts and increment described in the paragraph above.

File the October, 1969 report on the basis of the new license . . . by November 20, 1969. Subsequent reports will also of course be filed according to the terms of the new contract on the 20th of each following month. The 80-20 ratio of basic net receipts and increment should be used for October, November, and December 1969. A new allocation will be provided by Ascaph for 1970.

Choose basis for handling newspaper trade deals for years 1968, 1969, 1970 . . . by November 20, 1969. For 1971 and for each subsequent calendar year, a change can be made by Station giving Ascaph 90 days' advance written notice. See pp. 14-15 of this manual for detailed description of the newspaper trade option.

Make available to Ascap directly or through the Independent Accounting Firm, Schedule 1 of FCC Form 324 for the year 1968 . . . by November 20, 1969. For 1969 and subsequent years the report has to be made available not later than April 30 of the following year. See p. 8 of this manual.

File annual report for 1969 . . . within 30 days following receipt from Ascap of final basic net receipts and increment data which will probably be on or about April 30, 1970. At the time of such filing Stations remit additional amounts if due. An overpayment would be taken as a credit on the next monthly report. Annual reports for subsequent years will be handled in a similar manner.

GENERAL INSTRUCTIONS FOR COMPLETING STATEMENT OF ACCOUNT

To facilitate usage, material will be presented in order, line by line, as the items appear on the Statement of Account reporting form prepared by Stations. References are given to appropriate paragraph and page numbers of the License (Lic.) and to the Letter of Counsel (Ltr) since the exact language of the contract and letter governs in case of dispute. The pages of this manual are referred to as "Man. p. —."

1. The Reports. Each Station must file monthly reports using the estimated Ascap commercial percentages, and an annual report using the final commercial percentages. Ascap will notify Stations in October or November of each year of the estimated percentages to be used for the succeeding year. Ascap will notify Stations of the final percentages for each year in April of the succeeding year. Both estimates and final figures will be verified prior to Station notification by the Independent Accounting Firm and reviewed by the Committee (Lic. 6, pp. 13-16).

The same reporting form is used for the monthly and annual reports. The monthly report is due with payment 20 days after the end of each month; the annual report should be filed within 30 days after receipt of final figures from Ascap. Stations should usually receive final figures for each year from Ascap by April 30 of the following year and will thus usually file annual reports by May 30 (Lic. 6D, 7, pp. 14-16).

If the amount of the license fee calculated on the annual report is less than the aggregate of the monthly payments previously made for that calendar year, the Station should take credit on its succeeding monthly report form or forms. Conversely, if the amount of the license fee calculated on the annual report is greater than the aggregate of the monthly payments previously made, the Station should remit the difference to Ascap together with its annual report (Lic. 6D, pp. 14-15).

There are four Ascap reporting forms, two for network affiliated Stations (Optional Standard Deduction—Schedule I; Itemized Deductions—Schedule III), and two for independent Stations (Optional Standard Deduction—Schedule II; Itemized Deductions—Schedule

IV). Each Station has an election to use either the optional standard deduction or the itemized deduction form applicable to its classification as a network affiliated or independent Station (Ltr 9(g), p. 14).

2. FCC Form 324. For the purpose of cross-checking revenue figures, Schedule I of FCC Form 324 must be made available to Ascaph either directly or indirectly through the Independent Accounting Firm. As described in more detail (Man. p. 39), a Station must provide the requisite information to Ascaph within 120 days of the end of each calendar year by one of the following methods: (a) sending a copy of Schedule I of Form 324 to Ascaph; (b) sending a copy to the Independent Accounting Firm and directing it to report data supporting Lines 1 thru 3 of Station's statement of account to Ascaph, or (c) requesting the FCC to permit the Independent Accounting Firm to obtain the appropriate data from the Commission (Ltr 1(A)-(C), pp. 3-4).

3. Lines 1, 2 and 3 of Each Report Form. The amount of Total Gross Revenue is defined by the license and the letter, but Stations use different types of accounting methods and may use somewhat different procedures in preparing their FCC Form 324. Lines 1 and 2 on the Ascaph reporting forms are designed to facilitate reconciliation between the Ascaph gross revenue base (Line 3) and the Station's books of account and FCC filings. "Total Gross Revenue" (Line 3) is the Ascaph gross revenue base before deductions and exclusions (Ltr 1, pp. 1-4).

4. Definitions of Affiliated and Independent Stations. A Station is an *affiliated Station* if it regularly broadcasts television programs of a regular network (at present ABC, CBS and NBC), or if it appears on the network rate card and is interconnected or is a party to a non-interconnection affiliation agreement (Lic. 2C and E, p. 3). All other Stations are *independent Stations* (Lic. 2D, p. 3).

5. Alternative Methods of Program Cost Deduction (Ltr 5-9, pp. 8-14). Each Station can elect either the itemized or the optional standard cost deduction. The initial choice for the years 1968 thru 1970 must be made by November 20, 1969 (for Stations which have mailed signed contracts to Ascaph by October 6, 1969). Three opportunities to change

the method of deduction are available: once on January 1 of any of the years 1971-1973, by giving one year's prior notice; on January 1, 1974, by giving 90 days' prior notice, and once on January 1 of any of the years 1975-1977, by giving one year's notice. Any such notice must be given by the Station to Ascapi in writing (Ltr 9(f), pp. 13-14).

The itemized deduction method is the same for affiliated and independent Stations and includes 80% of film (including tape) and news service costs, some talent costs, rights, and certain prizes (Lic. 5G, pp. 11-12). An independent Station that itemizes deductions may deduct 5% of its gross revenue attributable to its locally produced remote programs and is also entitled to deduct a 20% sales commission on net receipts from sponsors in lieu of the 15% deduction for sales commission allowed in all other cases (Lic. 5C, p. 8).

The optional standard deduction for affiliated Stations is 15% of gross revenue subject to the commercial fee attributable to local live programs and to remote programs and 10% of all other revenue subject to the commercial fee, excluding revenue received from occasional networks not licensed at the source by Ascapi (Ltr 9(a)(c)-(e), pp. 11-13).^{*} Note that for purposes of the 10% deduction "all other revenue" includes revenue from announcements sold by the Station adjacent to and within network programs except for co-op spots (for definition of co-op spots see Man. p. 17).

The optional standard deduction for independent Stations consists of the following percentages of gross revenue subject to the commercial fee: 37½% of revenue attributable to local remote programs; 32½% of revenue attributable to local live programs; 10% of revenue from Station's sale of announcements preceding or within programs of an occasional network not licensed at the source by Ascapi, and 25% of all other revenue subject to the commercial fee, excluding revenue received from occasional networks not licensed at the source by Ascapi (Ltr 9(b)-(e), pp. 12-13).^{*}

In computing the optional standard deduction, each Station must: (1) classify the program by category; (2) compute the revenue attributable to the program, and (3) apply the proper percentage to the total revenue in each program category.

^{*} No deduction is permitted affiliated or independent Stations on revenue received from occasional networks not licensed at the source by Ascapi. See Man. pp. 16-17.

Step One—classifying the program. For affiliated Stations there are just two program classifications for purposes of computing the optional standard deduction: local live (including both studio and remote) and all other. For independent Stations there are four such program classifications: local live studio, local live remote, occasional network not licensed at source by Ascaph, and all other.

A local live program is not less than 36% live from the Station. The character of commercial announcements within a program, unlike break spots preceding or following a program, is considered in determining whether the 36% test has been met. On the other hand, revenue from break spots preceding the program is attributed to the program for the limited purpose of determining the classification of the break spot revenue for the optional standard deduction (Ltr 9(a)(i)(B), pp. 11-12).

The contract does not deal specifically with delayed broadcasting of live programs. The Committee is of the view that industry understanding and practice was intended to govern. Thus, for example, a live show pre-taped by a Station a short period before broadcast for the convenience of the Station or of the performers is a live show, but only the first time shown. Similarly, for example, movie film clips shot on location by the Station for current use in news, weather, or sports programs are "live", but such clips incorporated in a subsequent documentary would not be "live."

A local live remote program must meet the following tests: (a) consist of a sports or other public event, 90% of which (excluding commercials) is broadcast live or on a delayed basis within 24 hours or in extraordinary cases within 7 days of the event; (b) be produced by the Station; and (c) be not less than 30 minutes in length (Ltr 8, pp. 10-11).

An occasional network program is one which is furnished to the Station by an occasional network (Lic. 2F, pp. 3-4).

Step Two—computing the revenue attributable to each program (Ltr 8, 9(a)-(e), pp. 10-13). Obviously, revenue is attributed to a program if it is derived from the sale of program time, from other charges made to the sponsor incident to the program, or from participating

announcements within the program. Revenue from break spots preceding a program is also attributable to the program. Revenue from break spots following a program is not.

If a Station allocates a disproportionate share of its revenue to Station breaks immediately preceding its live or remote programs (which are subject to the higher optional standard deduction percentages), Ascaph has the right to disregard the Station's allocation and to divide the revenue from announcements in such Station breaks equally between the programs preceding the announcements and the programs following them.

For network affiliated Stations, the revenue from break spots preceding programs provided by regular networks and revenue from spots (other than co-op spots) sold by Stations within regular network programs are part of the "all other" category to which the appropriate optional standard deduction percentage is applied.

Step Three—applying the proper percentage to the revenue attributable to each program category. This step is obvious and requires no explanation.

Keeping track of every dollar of revenue for every month in order to use the optional standard deduction is not necessary. The license and letter contain no specific provisions covering the records required to be kept to substantiate allocation of revenue among various types of programs. In the opinion of the Committee, it would be unreasonable to expect Stations to keep detailed records of all revenue allocable to all programs; thus, a Station would be complying with the license terms if it maintains records on a statistically appropriate sampling or test-check basis and uses such data for allocating its revenue for Ascaph reporting purposes. Naturally, Ascaph has the right to audit the Station's data, but the Committee expects no audit problems if reasonable sampling or test-check methods are used.

STATEMENT OF ACCOUNT
AFFILIATED STATION
OPTIONAL STANDARD DEDUCTION

1. Gross Revenue (include all billings and bad debt recoveries)* [Lic. § 5D; Ltr. ¶s 1, 5]	\$ _____
2. Adjustments for Revenue Items:	
a. Add: Reportable Revenue not included in line 1 above [Lic. Par. 5D; Ltr. Pars. 1, 3, 4]	\$ _____
b. Deduct: Revenue not Reportable included in line 1 above [Ltr. Pars. 1, 3]	_____
3. Total Gross Revenue (Item 1 plus Item 2)	\$ _____
4. Less: Network Revenue:	
a. Revenue Received from Regular National Television Networks [Lic. § 2E; Ltr. ¶ 2]	\$ _____
b. Revenue Received from Occasional Networks Licensed by Society at the Source [Lic. § 2F; Ltr. ¶ 2]	_____
c. Gross Revenue from Sale of Cooperative Programs [Lic. § 5H]	_____
5. Total Gross Local Revenue (Item 3 less Item 4)	\$ _____
6. Less:	
a. Gross Political Revenue [Lic. § 5I]	\$ _____
b. Bad Debts Written Off [Lic. § 7C; Ltr. ¶ 5]	_____
c. Rate Card Discounts [Lic. § 5D]	_____
d. Revenue from Local Programs Licensed by Society at the Source [Lic. § 5J]	_____
7. Sub-Total (Item 5 less Item 6)	\$ _____
8. Less: Revenue Received from Occasional Networks Not Licensed at the Source [Ltr. ¶s 2a, 9c]	_____
9. Balance Subject to Optional Standard Deduction (Item 7 less Item 8) ..	\$ _____
10. Less: Optional Standard Deduction [Ltr. ¶ 9]:	
a. Revenue Attributable to Remote and Live Programs [Ltr. ¶ 9a(i)]	\$ _____ @ 15%
b. Other Revenue [Ltr. ¶ 9a(ii)]	_____ @ 10%
c. Total (not to exceed Item 9) ..	\$ _____
11. Total Revenue from Sale of Local Broadcasting Facilities (Item 7 less Item 10)	\$ _____
12. Less: Agency Commission paid (not to exceed 15% of Item 11) [Lic. § 5B]	_____
13. Net Receipts from Sponsors [Lic. § 5B] (Item 11 less Item 12)	\$ _____
14. Less: 15% Sales Commission [Lic. § 5C]	_____
15. Net Receipts from Sponsors after Deductions [Lic. § 5C] (Item 13 less Item 14)	\$ _____
16. Commercial Fee [Lic. ¶s 5A2, 6D]:	
Station's Basic Net Receipts—	
_____ % of Item 15	\$ _____ @ 2.0%
Station's Increment—	
_____ % of Item 15	\$ _____ @ 1.0%
Total \$ _____	
17. Sustaining Fee [Lic. ¶ 5A1]	_____
18. Total Amount Due	\$ _____

* All revenue must be reported on this line including "total Sale of station time" (FCC Form 324, Schedule I, line 11) plus "total incidental broadcast revenues" (FCC Form 324, Schedule I, line 18) plus all commissions, if any, deducted in reporting these amounts.

Report for the period from _____ through _____

FOR ASCAP USE ONLY	Station _____ Located at: _____
Checked by: _____	Operated by: _____
Check Number: _____	(by) _____
Am't of Check \$ _____	

**SCHEDULE I — FOR AFFILIATED STATION
ELECTING OPTIONAL STANDARD DEDUCTION**

Line 1—Gross Revenue

On monthly reports, enter gross revenue as shown by Station accounting records; on the annual report, enter the total of Line 11 plus Line 18 of Schedule 1 of Station FCC Form 324. For copies of Schedule 1 of the FCC form, the official instructions, and correspondence relating to the revenue required to be reported, see Man. pp. —.

Line 2—Adjustments for Revenue Items

These lines add items reportable to Ascac which were not reflected in Line 1 and deduct items which were reflected in Line 1 but which are not required to be included in Total Gross Revenue (Line 3). As a result, Line 3 reflects the Station's Ascac gross revenue base, before deductions and exclusions. For non-arm's length and affiliated transactions see Ltr 1(d)(e), p. 3 for special rules.

Line 2a—Add: Reportable Revenue Not Included in Line 1

Gross revenue reportable to Ascac should include (Lic. 5D, pp. 8-9; Ltr 1-5, pp. 1-8) all payments in money or any other form, made by or on behalf of sponsors for use of television broadcasting facilities of Station for local television programs (Lic. 2A, pp. 2-3). Merchandise, services or other items of value received in lieu of cash are to be reported at reasonable value (but not more than published rate card for facilities). Commissions deducted from revenue reported on Line 1 are to be reported here.

"All payments" includes payments for program material, rights, production, commercials, studio and line charges, manpower, equipment, facilities charges, or other items furnished in connection with use of broadcast facilities (Ltr 1(a), p. 2).

Network revenue includes all payments received from television networks (relative to programs broadcast on the Station) whether the networks are regular or occasional and whether or not the networks

are licensed at source. Revenue from regular networks and occasional networks licensed at source by Ascaph are deducted on Lines 4a and 4b of Schedule 1 (Ltr 2, pp. 4-5).

Common Reportable Trade Deals (Ltr 3(d), 4, pp. 6-8):

TV Guide—Reportable in the amount which TV Guide would charge any other advertiser at its applicable rate card (Ltr 4(a), p. 7).

Auto, Hotel, Airplane, Magazine or Other Product or Service Trades—Reportable in the amount which an outside purchaser would pay-supplier in cash for item traded (Ltr 4(b), pp. 7-8).

Products or Services of Related Companies—Unless specifically dealt with as summarized in Line 2b below, such products or services are reportable in the amount a Station would charge to any non-affiliated advertiser dealing at arm's length (Ltr 4(c), p. 8).

Trades With Newspapers—Unless Station elects to trade-out announcements with Ascaph, promotion announcements exchanged with newspapers for Station advertising are to be included in Total Gross Revenue (Line 3) as follows (Ltr 3(d), pp. 6-7):

Stations affiliated with newspaper—50% of ROS rate, or full rate card in non-ROS time period.

Station unaffiliated with newspaper—100% of ROS rate, or full rate card in non-ROS time period.

Station may elect to make time available to Ascaph for its institutional announcements in lieu of reporting newspaper trades as outlined above. If so it will give Ascaph announcements in number equal to 1 for each 100 traded out with newspapers (1.8 for each 100 in any year in which industry increment is not at least 10% in excess of basic net receipts). Station electing this spot trade-out with Ascaph includes neither newspaper nor Ascaph spots in Total Gross Revenue (Line 3). Notice in writing of such election must be given to Ascaph for the years 1968, 1969 and 1970 by November 20, 1969, and for subsequent years 90 days prior to the start

of the calendar year. This election may be terminated for subsequent calendar years upon 90 days' advance written notice.

Note: In no case will the amount reportable on any trade deal exceed Station's rate card for broadcasting facilities furnished to the sponsor (Ltr 4(d), p. 8).

Line 2b—Deduct: Revenue Not Reportable Included in Line 1

Syndication revenue is defined as revenue received by a Station from sale to others for broadcast on another Station of its program. Such revenue is not reportable to Ascapi if reporting Station is using optional standard deduction at time it broadcast the program. If the Station is itemizing deductions at the time it broadcasts the program, it has an election either to claim allowable program costs in full and include all syndication revenue from the program; or to claim no program costs and exclude all syndication revenue (Ltr 1(b), p. 2).

Revenue from activities not related to Station broadcasting activities included in the amount reported on Line 1 should be deducted on this line. Such revenue includes payment for: furnishing manpower or equipment to others (pick-ups for networks, other stations, or other companies) not related to reporting Station's broadcasting activities; production of films or other material for non-broadcast use; and production for another of television programs or commercials where the production is not related to sponsorship on the Station (Ltr 1(c), pp. 2-3).

Non-Reportable Trade Deals (Ltr 3, pp. 5-6):

Film Trades—The value of announcements or programs traded for films (programs on film, video tape or other recording material) by a Station is not includable in Total Gross Revenue (Line 3) (Ltr 3(a), p. 5).

In-Store Promotion—Amounts received from sponsors for announcements/programs are includable in Total Gross Revenue (Line 3). The value of announcements/programs given stores for promotion space made available to Station or advertiser is not includable in Total Gross Revenue (Line 3) (Ltr 3(b), pp. 5-6).

Radio-Television Cross Promotions—Promotion announcements exchanged with other radio or television Stations which are covered by blanket Ascaph licenses in effect at time of exchange are not includable in Total Gross Revenue (Line 3) (Ltr 3(c), p. 6).

Line 3—Total Gross Revenue

Enter here the total of Line 1 plus or minus Line 2. For checking purposes, Total Gross Revenue (Line 3) thus arrived at should equal the sum total of Line 3 of the 12 monthly statements previously filed, after taking into account any year-end adjustments not reflected in the monthly statements. If not, the matter should be reviewed in order that the proper amount be entered on Line 3 of the annual report.

Line 4—Less: Network Revenue

**Line 4a—Revenue Received from Regular
National Television Networks**

A *network television program* (Lic. 2B, p. 3) is a program broadcast either simultaneously or on a delayed basis over two or more affiliated Stations.

A *regular national television network* (Lic. 2E, p. 3) has 100 or more affiliated Stations and supplies programs broadcast by affiliated Stations on a regular basis on an average of not less than 40 hours each week in any six month period during term of this agreement (at present ABC, CBS and NBC).

Enter on Line 4a revenue received by the Station from regular national television networks.

**Line 4b—Revenue Received from Occasional Networks
Licensed by Ascaph at the Source**

Enter on Line 4b revenue from occasional television networks, licensed at the source by Ascaph. An *occasional network* is defined as a group of affiliated Stations which is not a regular national network (i.e., a group of affiliates other than ABC, CBS and NBC) and which is

not under common ownership (Lic. 2F, pp. 3-4). For occasional network programs not licensed at the source, Ascapi collects royalties from Stations only on the net amounts Stations receive from the occasional network and not on the amount the sponsor pays the network. Thus, all program and other costs are in effect automatically deducted before reaching Total Gross Revenue (Line 3 on all forms). Recognizing this automatic deduction of all program costs, the license does not permit any optional standard deduction for revenue from occasional networks not licensed at the source by Ascapi. However, both network affiliated and independent Stations electing the optional standard deduction are entitled to a 10% deduction on local revenue from sale of announcements within and preceding occasional network programs not licensed at the source by Ascapi. Local revenue from sale of announcements within and preceding occasional network programs licensed at the source by Ascapi falls into the "all other" category and is thus subject to the 10% and 25% deductions allowed for network affiliated and independent Stations, respectively (Ltr 9(a)-(c), pp. 11-13).

Line 4c—Gross Revenue from Sale of Co-operative Programs

The license defines "co-operative programs" as programs furnished by a regular national television network or by an occasional network licensed at the source by Ascapi under an arrangement permitting the Station to broadcast the program on a sustaining basis or on a commercial basis under the sponsorship of an advertiser contracting directly with the Station. Such co-operative programs are deemed to be network programs for purposes of the agreement (Lic. 5H, pp. 12-13).

The contract does not specifically identify the revenue which is deductible on Line 4c of the reporting form. In the Committee's view, it would be proper to enter on Line 4c 100% of the revenue from a spot if any portion of the revenue from the spot is shared with or paid to the network; where a Station retains the entire revenue from a spot, no portion of the revenue should be entered on Line 4c even though the spot appears during a co-op program.

Line 5—Total Gross Local Revenue

Enter here Line 3 less Line 4.

Line 6—Less:**Line 6a—Gross Political Revenue (Lic. 5I, p. 13)**

All payments from political local television programs and political announcements which were included in Total Gross Revenue (Line 3) are entered here since they are not subject to the license fee.

Line 6b—Bad Debts Written Off (Lic. 7C, pp. 16-17; Ltr 5, p. 8)

Enter here amounts previously reported as Total Gross Revenue (Line 3) which are now actually being written off. Subsequent recoveries should be reported in Total Gross Revenue (Line 3).

Line 6c—Rate Card Discounts (Lic. 5D, p. 8)

Enter here rate card discounts, quantity and/or frequency, actually allowed if not already deducted in reaching Total Gross Revenue (Line 3).

**Line 6d—Revenue from Local Programs Licensed
by Ascapi at the Source (Lic. 5J, p. 13)**

Enter here revenue from a local film or transcribed program in which Ascapi has granted a license at the source for the musical compositions embodied therein. Since such licenses are rarely, if ever, granted, a Station should be specifically advised that Ascapi has granted such a license at source before entering revenue on Line 6d.

Line 7—Sub-Total

Enter here Line 5 less the total of items on Lines 6a, b, c and d.

**Line 8—Less: Revenue from Occasional
Networks Not Licensed at Source**

No deduction may be taken either by an affiliated or independent Station on any amounts received from any occasional network not

licensed at the source by Ascaph (Ltr 9(c), p. 13) (see also, Man. pp. 16-17).

Enter here any such amounts received.

Line 9—Balance Subject to Optional Standard Deduction

Enter here Line 7 less Line 8.

Line 10—Less: Optional Standard Deduction

As previously described (Man. pp. 8-11), in lieu of itemizing its deductions, an affiliated Station may elect to report to Ascaph on Schedule I. This is the Statement of Account reporting form for affiliated Stations which embodies the optional standard deduction. The alternative reporting form is Schedule III which itemizes deductions. Independent Stations have similar options in Schedules II and IV.

Revenue reported on Line 9 by affiliated Stations electing the optional standard deduction is divided into two categories: (a) revenue attributable to remote programs and to live programs, for which the deduction is 15%; and (b) other revenue, for which the deduction is 10%.

Line 10a—Revenue Attributable to Remote and Live Programs

Enter here the total of Station revenue attributable to remote and live programs. Multiply this amount by 15% and enter the result to the right on Line 10a representing Station's optional standard deduction for remote and live programs.

For definitions of remote and live programs and determination of revenue attributable to such programs see Man. pp. 10-11.

Line 10b—Other Revenue (Ltr 9(a)(ii), p. 12)

Enter here Line 9 less Line 10a. Multiply this amount by 10% and enter the result to the right on Line 10b representing Station's optional standard deduction for all other programs.

Line 10c—Total

Enter here the total of Line 10a and Line 10b revenues, which must equal Line 9 revenue.

Line 11—Total Revenue from Sale of Local Broadcasting Facilities

Enter here Line 7 less the total optional standard deduction entered to the far right on Line 10b.

Line 12—Less: Agency Commission Paid

Enter here the actual amount of agency commissions paid or allowed to recognized advertising agencies not controlled or owned by Station, subject to a limitation of 15% of Line 11 (Lic. 5B, p. 8).

Line 13—Net Receipts from Sponsors

Enter here Line 11 less Line 12 (Lic. 5B, p. 8).

Line 14—Less: 15% Sales Commission

Enter here 15% of Line 13 (Lic. 5C, p. 8).

Line 15—Net Receipts from Sponsors after Deductions

Enter here Line 13 less Line 14 (Lic. 5C, p. 8).

Line 16—Commercial Fee

Effective January 1, 1968, Stations will pay a commercial fee of 2% on basic net receipts and 1% on increment as reported on Schedules I through IV. Each Station will divide its net receipts from sponsors (Line 15 of Schedules I and II and Line 13 of Schedules III and IV) between basic net receipts and increment in accordance with percentages derived on an industry-wide basis. The appropriate amounts are entered on Line 16 of Schedules I and II and on Line 14

of Schedules III and IV and multiplied by 2% and 1% respectively to arrive at the commercial fee.

The mechanics and procedures for determination of the industry-wide percentages to be furnished to the Station and the procedures to be followed by the Station thereafter are outlined at Man. pp. 36-39. For the percentages and procedures relative to the filing of 1968 and 1969 reports see Man. pp. 5-6.

Enter here the appropriate amounts.

Note: For fees payable for the years 1962 through 1967 see Man. pp. 32, 34.

Line 17—Sustaining Fee

Detailed instructions as to the various periods and rates applicable are outlined at Man. pp. 32-35.

Enter here the appropriate amount.

Line 18—Total Amount Due

Enter here the total of Line 16 and Line 17. This is the amount which is due Ascap per the report being submitted.

STATEMENT OF ACCOUNT
INDEPENDENT STATION
OPTIONAL STANDARD DEDUCTION

1. Gross Revenue (include all billings and bad debt recoveries)* [Lic. § 5D; Ltr. ¶s 1, 5]	\$ _____
2. Adjustments for Revenue Items:	
a. Add: Reportable Revenue not included in line 1 above [Lic. Par. 5D; Ltr. Pars. 1, 3, 4]	\$ _____
b. Deduct: Revenue not Reportable included in line 1 above [Ltr. Pars. 1, 3]	_____
3. Total Gross Revenue (Item 1 plus Item 2)	\$ _____
4. Less: Network Revenue:	
a. Revenue Received from Regular National Television Networks [Lic. ¶ 2E; Ltr. ¶ 2]	\$ _____
b. Revenue Received from Occasional Networks Licensed by Society at the Source [Lic. ¶ 2F; Ltr. ¶ 2]	_____
c. Gross Revenue from Sale of Cooperative Programs [Lic. ¶ 5H]	_____
5. Total Gross Local Revenue (Item 3 less Item 4)	\$ _____
6. Less:	
a. Gross Political Revenue [Lic. ¶ 5I]	\$ _____
b. Bad Debts Written Off [Lic. ¶ 7C; Ltr. ¶ 5]	_____
c. Rate Card Discounts [Lic. ¶ 5D]	_____
d. Revenue from Local Programs Licensed by Society at the Source [Lic. ¶ 5J]	_____
7. Sub-Total (Item 5 less Item 6)	\$ _____
8. Less: Revenue Received from Occasional Networks Not Licensed at the Source [Ltr. ¶s 2a, 9c]	_____
9. Balance Subject to Optional Standard Deduction (Item 7 less Item 8) ..	\$ _____
10. Less: Optional Standard Deduction [Ltr. ¶ 9]:	
a. Revenue Attributable to Remote Programs [Ltr. ¶ 9b(i)] \$ _____ @ 37½%	\$ _____
b. Revenue Attributable to Live Programs [Ltr. ¶ 9b(ii)] \$ _____ @ 32½%	_____
c. Revenue Attributable to Local Sale of Occasional Network Announcements [Ltr. ¶ 9b(iii)] \$ _____ @ 10%	_____
d. Other Revenue [Ltr. ¶ 9b(iv)] \$ _____ @ 25%	_____
e. Total (not to exceed Item 9) \$ _____	_____
11. Total Revenue from Sale of Local Broadcasting Facilities (Item 7 less Item 10)	\$ _____
12. Less: Agency Commission Paid (not to exceed 15% of Item 11) [Lic. ¶ 5B]	_____
13. Net Receipts from Sponsors [Lic. ¶ 5B] (Item 11 less Item 12)	\$ _____
14. Less: 15% Sales Commission [Lic. ¶ 5C]	_____
15. Net Receipts from Sponsors after Deductions [Lic. ¶ 5C] (Item 13 less Item 14)	\$ _____
16. Commercial Fee [Lic. ¶s 5A2, 6D]:	
Station's Basic Net Receipts—	
_____% of Item 15	\$ _____ @ 2.0% _____
Station's Increment—	
_____% of Item 15	\$ _____ @ 1.0% _____
Total \$ _____	
17. Sustaining Fee [Lic. ¶ 5A1]	_____
18. Total Amount Due	\$ _____

* All revenue must be reported on this line including "total sale of station time" (FCC Form 324, Schedule I, line 11) plus "total incidental broadcast revenue" (FCC Form 324, Schedule I, line 18) plus all commissions, if any, deducted in reporting these amounts.

Report for the period from _____ through _____	
FOR ABCAP USE ONLY Checked by: _____ Check Number: _____ Am't of Check \$: _____	Station: _____ Located at: _____ Operated by: _____ (by) _____

**SCHEDULE II — FOR INDEPENDENT STATION
ELECTING OPTIONAL STANDARD DEDUCTION**

Lines 1 thru 9—Same as Schedule I

See Schedule I Instructions.

Line 10—Less: Optional Standard Deduction

**Line 10a—Revenue Attributable to Remote
Programs (Ltr 9(b)(i), p. 12)**

See definition of local remote program and method for determining attributable revenue (Man. pp. 10-11).

Take $37\frac{1}{2}\%$ of amount entered on Line 10a as optional standard deduction for remote programs and enter to right on Line 10a.

Line 10b—Revenue Attributable to Live Programs (Ltr 9(b)(ii), p. 12)

See definition of local live program and method for determining attributable revenue (Man. pp. 10-11).

Take $32\frac{1}{2}\%$ of amount entered on Line 10b as optional standard deduction for local live programs and enter to right on Line 10b.

**Line 10c—Revenue Attributable to Local Sale of Occasional
Network Announcements—Not Licensed at
Source (Ltr 9(b)(iii), p. 12)**

See definition of occasional network and method for determining attributable revenue (Man. pp. 10-11, 16-17).

Enter here revenue from Station's sale of announcements within and preceding occasional network programs not licensed at source by Ascapi. Take 10% of this amount as the optional standard deduction for such occasional network announcements and enter this amount to the right on Line 10c. Revenue from Station's sale of announcements within and preceding occasional network programs licensed at the source by Ascapi falls into Line 10d.

Line 10d—Other Revenue (Ltr 9(b)(iv), p. 12)

Subtract revenues reported on Lines 10a, b and c from Line 9 and enter this amount on Line 10d. Take 25% of Line 10d as optional standard deduction for other revenue and enter this amount to right on Line 10d.

Lines 11 thru 18—Same as Schedule I

See Schedule I Instructions.

STATEMENT OF ACCOUNT

AFFILIATED STATION
ITEMIZED DEDUCTIONS

1. Gross Revenue (include all billings and bad debt recoveries)* [Lic. ¶ 5D; Ltr. ¶s 1, 5] \$ _____

2. Adjustments for Revenue Items:

 a. Add: Reportable Revenue not included in line 1 above [Lic. Par. 5D; Ltr. Para. 1, 3, 4] \$ _____

 b. Deduct: Revenue not Reportable included in line 1 above [Ltr. Para. 1, 3] _____

3. Total Gross Revenue (Item 1 plus Item 2) \$ _____

4. Less: Network Revenue:

 a. Revenue Received from Regular National Television Networks [Lic. ¶ 2E; Ltr. ¶ 2] \$ _____

 b. Revenue Received from Occasional Networks Licensed by Society at the Source [Lic. ¶ 2F; Ltr. ¶ 2] _____

 c. Gross Revenue from Sale of Cooperative Programs [Lic. ¶ 5H] _____

5. Total Gross Local Revenue (Item 3 less Item 4) \$ _____

6. Less:

 a. Gross Political Revenue [Lic. ¶ 5I] \$ _____

 b. Bad Debts Written Off [Lic. ¶ 7C; Ltr. ¶ 5] _____

 c. Rate Card Discounts [Lic. ¶ 5D] _____

 d. Revenue from Local Programs Licensed by Society at the Source [Lic. ¶ 5J] _____

7. Sub-Total (Item 5 less Item 6) \$ _____

8. Itemized Deductions:

 a. Film [Lic. ¶ 5G1; Ltr. ¶ 6] ... (80% of \$ _____) \$ _____

 b. Talent [Lic. ¶ 5G2; Ltr. ¶ 7] _____

 c. Broadcast Rights [Lic. ¶ 5G3] _____

 d. Remote Lines [Lic. ¶ 5G4] _____

 e. Prizes [Lic. ¶ 5G5] _____

 f. Outside News Service [Lic. ¶ 5G6] (80% of \$ _____) _____

 Total Itemized Deductions _____

9. Total Revenue from the Sale of Local Broadcasting Facilities (Item 7 less Item 8) \$ _____

10. Less: Agency Commission Paid (not to exceed 15% of Item 9) [Lic. ¶ 5B] _____

11. Net Receipts from Sponsors [Lic. ¶ 5B] (Item 9 less Item 10) \$ _____

12. Less: 15% Sales Commission [Lic. ¶ 5C] _____

13. Net Receipts from Sponsors after Deductions [Lic. ¶ 5C] (Item 11 less Item 12) \$ _____

14. Commercial Fee [Lic. ¶s 5A2, 6D]:

 Station's Basic Net Receipts—
 % of Item 13 \$ _____ @2.0% _____

 Station's Increment—
 % of Item 13 \$ _____ @1.0% \$ _____

 Total \$: _____

15. Sustaining Fee [Lic. ¶ 5A1] _____

16. Total Amount Due \$ _____

* All revenue must be reported on this line including "total Sale of station time" (PCC Form 324, Schedule I, line 11) plus "total incidental broadcast revenues" (PCC Form 324, Schedule I, line 18) plus all commissions, if any, deducted in reporting these amounts.

Report for the period from _____ through _____

FOR ABCAP USE ONLY	
Checked by: _____	Station _____ Located at: _____
Check Number _____	Operated by: _____
Am't of Check \$ _____	(by) _____

**SCHEDULE III — FOR AFFILIATED STATION
ELECTING TO ITEMIZE DEDUCTIONS**

Lines 1 thru 7—Same as Schedule I

See Schedule I Instructions.

Line 8—Itemized Deductions

In determining the amounts of the itemized deductions described below, all payments whether in money or in any other form are included. Where payments other than cash are made, reasonable value governs this determination.

Line 8a—Film (Lic. 5G1, p. 11; Ltr 6, pp. 8-9)

Station may deduct 80% of the cost of films or video tapes purchased for use on its local television programs (Lic. 5G1, p. 11). "Video Tapes" means video tapes or any other recording material now used, or used hereafter, in their place (Lic. 2G, p. 4).

Station's deduction is determined by pro rating the amount paid or payable to the film distributor over the life of the contract on a straight line basis, or by any other method of write-off or deduction which is allowed by the Internal Revenue Service for income tax purposes. Expense incidental charges as and when incurred (Ltr 6, pp. 8-9).

In the Committee's view, a deduction claimed on a Station's tax return as filed should be deemed allowed unless and until changed as a result of audit or other settlement with the Internal Revenue Service. In the case of such a change in tax reporting, appropriate adjustment should be made in the next monthly Ascaph reporting form.

For films or tapes purchased from other than a film distributor or acquired through purchase of a station, the amount which Station may deduct is the residual amount pro rated over the residual life of such films and tapes. Residual amount is the amount paid or payable to the film distributor by the original purchaser less the amount deducted as film cost in previous monthly reportings to Ascapi by that purchaser.

If supplier is affiliated in common ownership with Station then the amount of the deduction is controlled by cost which would have been arrived at in an "arm's length" transaction.

Line 8b—Talent (Lic. 5G2, pp. 11-12; Ltr 7, pp. 9-10)

The following rules apply to deduction of payments to personnel who appear on the air on Station's local television programs including commercials.

Deduct 100% of salary and talent fees paid on-the-air talent engaged solely for a particular program or programs (Lic. 5G2a, p. 11).

Deduct 100% of talent fees paid staff announcers above their base salaries (Lic. 5G2b, p. 11).

For on-the-air personnel who have other duties (e.g., announcer who may also be News Director, Sports Director or Weatherman or personality who assembles and prepares material for other programs than his own, or who has general supervisory or administrative duties not related solely to his own program or programs)—deduct 100% of talent fees above their base salaries up to a maximum of 50% of individual's total compensation (Lic. 5G2c, pp. 11-12; Ltr 7(a), pp. 9-10).

Time spent by an on-the-air personality in assembling, preparing and promoting his own program or programs qualifies as "engaged solely for a particular program or programs" (Ltr 7(a), p. 9).

Base salary will be deemed to be base salary per Station's Aftra contract. If the Station is not party to an Aftra agreement, each individual's base salary will be an amount equal to the proportion of his total compensation equivalent to average "40-hour weekly wage" divided by average "gross weekly compensation" for staff announcers in same category of market size and geographical location as shown in NAB's "Wages, Hours, and Employment Report for Television" for year covering or closest to the period in question (Ltr 7(b), p. 10).

Note: Although a Station may not be a party to an Aftra agreement, its base salary scale may be acceptable to Ascapi and the necessity for making adjustments pursuant to the preceding paragraph eliminated by mutual agreement.

In computing the amount deductible as talent costs: *include* salary and talent fees; *exclude* social security, pension, petty cash or other payroll costs (Ltr 8(c), p. 10).

Line 8c—Broadcast Rights (Lic. 5G3, p. 12)

Stations may deduct the actual payment made for broadcast rights for a sports program or other special event.

Line 8d—Remote Lines (Lic. 5G4, p. 12)

Stations may deduct the actual payments made to or for the telephone company or like transmission utility for remote pickup for local television programs.

Line 8e—Prizes (Lic. 5G5, p. 12)

Stations may deduct actual payments for prizes given to participants appearing (by sight or sound) on a local television program.

Line 8f—Outside News Service (Lic. 5G6, p. 12)

Stations may deduct 80% of actual payments to bona fide supplier (e.g., AP, UPI or other similar agency) which is not affiliated or in common ownership with Station.

Line 9—Total Revenue From Sale of Local Broadcasting Facilities

Enter here Line 7 less Line 8.

Line 10—Less: Agency Commission Paid

Enter here the actual amount of agency commissions paid or allowed to recognized advertising agencies not controlled or owned by Station, subject to a limitation of 15% of Line 9 (Lic. 5B, p. 8).

Line 11—Net Receipts From Sponsors

Enter here Line 9 less Line 10 (Lic. 5B, p. 8).

Line 12—Less: 15% Sales Commission

Enter here 15% of Line 11 (Lic. 5C, p. 8).

Line 13—Net Receipts From Sponsors After Deductions

Enter here Line 11 less Line 12 (Lic. 5C, p. 8).

Line 14—Commercial Fee

For computation of commercial fee see instructions under Line 16, Man. pp. 20-21.

Enter here the appropriate amount.

Line 15—Sustaining Fee

Detailed instructions as to the various periods and applicable rates relating to computation of sustaining fees are outlined at Man. pp. 32-35.

Enter here the appropriate amount.

Line 16—Total Amount Due

Enter here the total of Line 14 and Line 15. This is the amount which is due Ascapi per the report being submitted.

STATEMENT OF ACCOUNT

INDEPENDENT STATION
ITEMIZED DEDUCTIONS

1. Gross Revenue (include all billings and bad debt recoveries)* [Lic. ¶ 5D; Ltr. ¶s 1, 5] \$ _____

2. Adjustments for Revenue Items:

a. Add: Reportable Revenue not included in line 1 above [Lic. Par. 5D; Ltr. Para. 1, 3, 4] \$ _____

b. Deduct: Revenue not Reportable included in line 1 above [Ltr. Para. 1, 3] _____

3. Total Gross Revenue (Item 1 plus Item 2) \$ _____

4. Less: Network Revenue:

a. Revenue Received from Regular National Television Networks [Lic. ¶ 2E; Ltr. ¶ 2] \$ _____

b. Revenue Received from Occasional Networks Licensed by Society at the Source [Lic. ¶ 2F; Ltr. ¶ 2] _____

c. Gross Revenue from Sale of Cooperative Programs [Lic. ¶ 5H] _____

5. Total Gross Local Revenue (Item 3 less Item 4) \$ _____

6. Less:

a. Gross Political Revenue [Lic. ¶ 5I] \$ _____

b. Bad Debts Written Off [Lic. ¶ 7C; Ltr. ¶ 5] _____

c. Rate Card Discounts [Lic. ¶ 5D] _____

d. Revenue from Local Programs Licensed by Society at the Source [Lic. ¶ 5J] _____

7. Sub-Total (Item 5 less Item 6) \$ _____

8. Itemized Deductions:

a. Film [Lic. ¶ 5G1; Ltr. ¶ 6] ... (80% of \$ _____) _____

b. Talent [Lic. ¶ 5G2; Ltr. ¶ 7] _____

c. Broadcast Rights [Lic. ¶ 5G3] _____

d. Remote Lines [Lic. ¶ 5G4] _____

e. Prizes [Lic. ¶ 5G5] _____

f. Outside News Service [Lic. ¶ 5G6] (80% of \$ _____) _____

g. 5% of Revenue Attributable to Locally Produced Remote Programs [Ltr. ¶ 8] (5% of \$ _____) _____

Total Itemized Deductions _____

9. Total Revenue from Sale of Local Broadcasting Facilities (Item 7 less Item 8) \$ _____

10. Less: Agency Commission Paid (not to exceed 15% of Item 9) [Lic. ¶ 5B] _____

11. Net Receipts from Sponsors [Lic. ¶ 5B] (Item 9 less Item 10) \$ _____

12. Less: 20% Sales Commission [Lic. ¶ 5C] _____

13. Net Receipts from Sponsors after Deductions [Lic. ¶ 5C] (Item 11 less Item 12) \$ _____

14. Commercial Fee [Lic. ¶s 5A2, 6C]:

Station's Basic Net Receipts—
_____ % of Item 13 \$ _____ @2.0% _____

Station's Increment—
_____ % of Item 13 \$ _____ @1.0% \$ _____

Total \$ _____

15. Sustaining Fee [Lic. ¶ 5A1] _____

16. Total Amount Due \$ _____

* All revenue must be reported on this line including "total sale of station time" (FCC Form 324, Schedule I, line 11) plus "total local direct broadcast revenue" (FCC Form 324, Schedule I, line 18) plus all commissions, if any, deducted in reporting these amounts.

Report for the period from _____ through _____

FOR ABCAP USE ONLY

Classified by: _____

Check Number: _____

Am't of Check \$: _____

Station: _____ Located at: _____

Operated by: _____

(by) _____

**SCHEDULE IV—FOR INDEPENDENT STATION
ELECTING TO ITEMIZE DEDUCTIONS**

Lines 1 Thru 7—Same as Schedule I

See Schedule I Instructions.

Line 8—Itemized Deductions

Lines 8a Thru 8f—Same as Schedule III

See Schedule III Instructions.

**Line 8g—5% of Revenue Attributable to Locally Produced
Remote Programs (Ltr 8, pp. 10-11)**

An independent Station that itemizes deductions may deduct on Line 8g an additional amount equal to 5% of revenue attributable to locally produced remote programs (reported on Line 7 of Schedule IV). See definition of a local remote program and method for determining attributable revenue at Man. pp. 10-11.

Lines 9 Thru 11—Same as Schedule III

See Schedule III Instructions.

Line 12—Less 20% Sales Commission

Enter here 20% of Line 11 (Lic. 5C, p. 8).

Lines 13 Thru 16—Same as Schedule III

See Schedule III Instructions.

APPENDIX

Period of License and Fees Payable

The prior blanket license terminated on December 31, 1961. From January 1, 1962 until December 31, 1967 the provisions of the prior license were extended subject to retroactive adjustment under order of the United States District Court in Manhattan (Court Order, 1). The new blanket license agreement is fully effective as of January 1, 1968 although certain adjustments occur both before and after this date. A brief outline of these provisions as they relate to commercial fees and sustaining fees follows.

Commercial Fee

Period 1/1/62-12/31/63: Prior contract provisions apply.

Period 1/1/64-12/31/65: 2.05% fee reduced to 2.0%. All other provisions remain unchanged.

Period 1/1/66-12/31/67: Amounts due Ascaph from each Station will be recomputed by Ascaph according to terms and conditions of prior contract but applying the new 2.0-1.0% stairstep rate formula.

Period 1/1/68-12/31/77: New agreement effective in full for this 10 year period subject to the right of either party to terminate on December 31, 1973.

Sustaining Fee

Period 1/1/62-12/31/63: Prior contract provisions apply.

Period 1/1/64-12/31/67: Reduction of 30% on fee provided for under prior contract.

Period 1/1/68-12/31/68:

(a) Stations licensed by Ascaph on January 1, 1968 which (i) published both a quarter hour and an hour rate in their highest priced time segment (program) on their rate card in effect on January 1, 1968, and which (ii) reported and paid fees under the blanket license for 36 months by January 1, 1968, will determine their monthly fees for

1968 as equal to 70% of their highest quarter hour card rate in effect on January 1, 1968 (Lic. 5A1a(1)(3), pp. 6-7).

Note: Adjustment of Quarter Hour Rate for 1968—If highest published quarter hour rate in effect on January 1, 1968 is less than 37½% of highest published hour rate use 37½% of latter; if more than 42½% use 42½%. Use the published rate if it is between 37½% and 42½% (Lic. 5A1a(1), p. 6). "Published quarter hour rate" as used above is the program time charge and does not include separately stated amounts for live camera, studio charges, etc. which are not included in the published rate.

(b) Stations which do not meet both conditions (i) and (ii) described in paragraph (a) above will determine their monthly fees for 1968 based on an industry average. The sustaining fee paid by such a Station shall bear the same ratio to its commercial fee as the average ratio of sustaining to commercial fees of other Stations in the same FCC annual report revenue category (Lic. 5A1a(3) & b(1), pp. 6-7). Ascap will advise Stations in this category of the ratios to be used in determining their sustaining fees. Until Ascap furnishes the necessary industry averages, Stations in this category should use 70% of their highest quarter hour rate in effect on January 1, 1968 (adjusted, if necessary, as described in the Note above) or 28% of their hour rate in effect on that date if no quarter hour rate was published. The sustaining fee paid on this basis should be adjusted when Ascap furnishes the necessary industry averages.

Period 1/1/69-12/31/77:

(a) All Stations paying sustaining fees in 1968, except those Stations which had not passed the 36 month test by January 1, 1968, are to compute sustaining fees for subsequent years by dividing total 1968 sustaining fee (SF) by total 1968 commercial fee (CF) and applying the resulting percentage (%SF) to the commercial fee paid in each month to obtain the sustaining fee for that month. Upon filing of the annual report adjusting their commercial fees for the preceding year, Stations will make corresponding adjustments to their sustaining fees for that year (Lic. 5A 1a(2), p. 6).

$$\text{Step One—} \frac{1968 \text{ SF}}{1968 \text{ CF}} = \% \text{SF}$$

$$\text{Step Two—} 19\text{xx Monthly CF} \times \% \text{SF} = 19\text{xx Monthly SF}$$

$$\text{Step Three—} 19\text{xx Annual CF} \times \% \text{SF} = 19\text{xx Annual SF}$$

(b) Stations which failed to pass the 36 month test by January 1, 1968, or which began broadcasting after that date, are to pay sustaining fees on the basis of industry averages until the close of the first year in which the 36 month test was met by June 30 of that year. In succeeding years, the Station's monthly sustaining fee is computed by dividing its total sustaining fee for the first year in which it met the 36 month test by its total commercial fee for that year and applying the resulting percentage to the commercial fee paid in each month to obtain the sustaining fee for that month (Lic. 5A 1b(1)(2), p. 7). The same percentage is applied to the annual commercial fee to determine the annual sustaining fee. Until Ascap furnishes the necessary industry averages, Stations in this category should use 70% of their highest quarter hour rate in effect on January 1, 1968 or on the first day of the first month thereafter on which broadcasting began (adjusted, if necessary, as described in the Note on the preceding page) or 28% of the hour rate in effect on such date if no quarter hour rate was published. The sustaining fee paid on this basis should be adjusted when Ascap furnishes the necessary industry averages.

Note: Computations involving the use of industry ratios required above are to be made by Ascap subject to verification by the Independent Accounting Firm—Arthur Andersen & Co. or any successor designated by the Court. Such computations will also reflect the 37½%-42½% adjustments outlined in the Note on the preceding page (Lic. 5A 1c, p. 7).

Retroactivity

Period 1/1/64-12/31/67:

Ascap will compute retroactivity and pay Stations on the following timetable: 60% by December 1, 1969; 20% by December 1, 1970; and the remaining 20% by December 1, 1971. In the event Ascap fails to make such payments, a Station may credit the amounts due against its next payments to Ascap (Court Order, 4).

Note: For the years 1964-1967 Ascap will recompute the license fees payable for each Station on the basis of reports previously filed by these Stations and the rates described above for the commercial and sustaining fees and will notify each Station of the amount to which it is entitled. However, nothing in the Court's order directing the payment of retroactivity is to be deemed to modify any settlements between Ascap and Stations with respect to license fees payable for the years prior to 1968 (Court Order, 4d).

Period 1/1/68-9/30/69:

Stations are to submit a single revised report for 1968 and a single revised report for the first nine months of 1969. Ascap has agreed that for Stations mailing signed agreements to Ascap by October 6, 1969, these reports are to be submitted not later than November 20, 1969. If additional amounts are owed for this period they are to be paid with submission of the revised reports. If there has been an overpayment, the amount should be taken as a credit by Stations in their succeeding report or reports to Ascap.

Performances Licensed and Music Usage Reporting*Performances*

The agreement relates to public non-dramatic performances by television broadcast of musical compositions copyrighted, composed or written by Ascap members (Lic. 1A, B, 4A, pp. 1, 5).

Except as expressly provided, the agreement does not authorize Station to license others to reproduce compositions it broadcasts nor does it authorize receivers to perform publicly or reproduce such broadcast for profit (Lic. 1C, p. 2).

The agreement covers local television programs produced solely for broadcast purposes in studio, auditorium or hall where audience is admitted free or where entire admittance charge is paid to an eleemosynary institution which requests gratuitous license from Ascap (Lic. 5K, p. 13).

Music Usage Reporting

Station will furnish to Ascap upon request:

(a) a list of all musical compositions (or, at its option, all licensed compositions) in Station's local television programs showing title, composer and author of each composition and brief notation of scenery and costumes used—up to an aggregate of 3 months in any calendar year (Lic. 3A, p. 4);

(b) dialogue of programs specified in paragraph (a) above (Lic. 3B, p. 4);

(c) for motion pictures or other prerecorded programs produced for multi-station sale and for which cue sheets are customarily made,

reporting requirements above will be fulfilled if Station furnishes Ascapi with title, and (if available) name the producer, copyright notice and cue sheet (Lic. 3C, p. 4).

Ascapi's requests pursuant to (a) and (b) above must be reasonable and given on 3 months' notice prior to the period covered by the request, except that no limitations apply to requests made in connection with litigation (Lic. 3D, 11A, pp. 5, 17-18).

Determination of Industry Basic Net Receipts and Increment

Stations Initially Included (Lic. 5E1, pp. 9-10)

"Basic net receipts" is initially the average of total net receipts from sponsors (after deductions) on which reports and payments were made to Ascapi for the years 1964 and 1965 by all local television Stations (excluding ABC, CBS and NBC O & O Stations):

(a) which had been licensed under Ascapi's blanket license during 1964 and 1965; and

(b) which had been licensed by Ascapi prior to July 1, 1961 and had submitted reports and payments under such license for the entire period July 1, 1961 thru December 31, 1965 on or before August 15, 1968; and

(c) which had not discontinued operations prior to July 1 of the calendar year for which such basic net receipts are being computed; and

(d) for the calendar years beginning January 1, 1974, which have renewed this agreement "as is" through December 31, 1977, Ascapi having similarly renewed.

Stations Initially Excluded (Lic. 5E3, pp. 10-11)

Excluded from the computation of basic net receipts are the revenues of all local television Stations which were:

(a) licensed under Ascapi's blanket license prior to July 1, 1961 and had not submitted reports and payments for entire period July 1, 1961 thru December 31, 1965 on or before August 15, 1968; or

(b) not licensed under Ascapi's blanket license prior to July 1, 1961 but had been broadcasting on a regular basis for 36 or more consecu-

tive months prior to June 30, 1964 and failed to submit reports and payments for 36 or more consecutive months by June 30, 1964 under blanket license terms.

*Future Additions (Deletions) to Basic Net Receipts
(Lic. 5E2, p.10)*

All other Stations (not specifically covered above) will be added to the Industry Base in the calendar year in which they shall have submitted timely reports and payments under the effective blanket license for 36 consecutive months by June 30 of any year after 1964.

Ascap will furnish the Independent Accounting Firm with a list of Stations which would be eligible for inclusion in the base, except for failure to make timely filing and payment, as of June 30 of any year subsequent to 1964. It is anticipated that the Independent Accounting Firm will advise the listed Stations of the deficiencies. Each Station will have 60 days after Ascap furnishes such list to the Independent Accounting Firm to submit reports and payments and thereby be added to the Industry Base.

Determination of Increment (Lic. 5F, p. 11)

Increment for each year will be the excess of the aggregate net receipts from sponsors after deductions for Stations included in the base over basic net receipts.

Some Stations qualify and enter the base initially with average 1964/1965 revenues; others qualify and enter in a later year. From the aggregate net receipts from sponsors after deductions in any future year, total basic net receipts is deducted to arrive at increment. The base and increment are then expressed as percentages and furnished to Stations for use in computing their commercial fee.

Computation of Basic Net Receipts and Increment

Industry Figures

(a) On or before the last day of February in each calendar year during the term of this agreement, Ascap will:

(i) compute basic net receipts for the preceding year with adjustments to delete previously included receipts of Stations which

discontinued operations prior to July 1 of the preceding year or, with respect to calendar years 1974 and thereafter, which did not renew this agreement "as is" and to add Stations which qualified by meeting the 36 month test by June 30 of the preceding year (Lic. 6A1, p. 13), and

- (ii) compute increment for preceding year (Lic. 6A2, p. 13).

Note: Relative to these computations, Ascap will furnish the Independent Accounting Firm a list showing: each Station included; each Station excluded and explanation therefore, and the amounts for each included Station. Ascap will make the necessary books and records available to the Independent Accounting Firm which will consider all such data confidential (Lic. 6A, pp. 13-14).

(b) Not later than March 31, the Independent Accounting Firm will complete its verification of Ascap's computations for the preceding calendar year and, after reviewing its findings with Ascap, will notify the Committee of its conclusions. In the event the Committee does not agree with Ascap on the computations, the matter will be submitted to the Court for adjudication with the Committee representing Stations as their attorney in fact (Lic. 6B, p. 14).

(c) Within 30 days after agreement or judicial determination of basic net receipts and increment, Ascap will notify Stations of these amounts (Lic. 6C, p. 14).

(d) Upon receipt of these figures, each Station will (Lic. 6D, pp. 14-15):

- (i) divide its net receipts from sponsors after deductions for the calendar year covered by the notice in proportion to industry basic net receipts and increment to arrive at Station's basic net receipts and Station's increment;
- (ii) compute its license fees due for that year pursuant to the agreement; and
- (iii) pay any additional fees due within 30 days after receipt of such notice; or
- (iv) deduct overpayment of fees from subsequent monthly payments to Ascap.

Estimated Basic Net Receipts and Increment

(*Lic. 6E, pp. 15-16*)

Each year, Ascap will estimate a rate of growth for the current year over the prior year based on the first eight months of the current year as compared with the first eight months of the prior year. The current year's industry revenues thus estimated will be projected at the same rate of growth to derive an estimate for the following year. This estimate for the following year will be used to arrive at the estimated basic net receipts and estimated increment which Stations will utilize in their monthly reports.

Ascap's estimate for each year will be reported to both the Independent Accounting Firm and the Committee by October 15 of the preceding year. The Independent Accounting Firm will verify the estimate by December 1; promptly thereafter Ascap will notify Stations of these estimated figures.

Furnishing Station FCC Form 324 Data to Ascap

Within 120 days after close of each calendar year, each reporting Station has these options (Ltr 1(A)-(C), pp. 3-4):

A. *to send Ascap* a copy of Schedule 1 of Form 324 for that year (or its equivalent then in effect for years after 1968 should FCC Form 324 Schedule 1 be changed);

B. *to send to the Independent Accounting Firm* a copy of Schedule 1 of Form 324 and direct it to report data supporting Lines 1-3 of the Station's Statement of Account to Ascap; or

C. *to request the FCC* to permit the Independent Accounting Firm to copy from its filed Form 324 and report the data to Ascap as in B above.

Note: Failure on the part of the Independent Accounting Firm to furnish Ascap the data by October 1 of the following year ends options B and C for that year and Station must promptly furnish Ascap with a copy of Schedule 1 of Form 324 (option A).

If amounts reported to the FCC exceed those reported to Ascaph the reporting Station loses option C. It may then use either option A or B. If it uses option B, the Independent Accounting Firm must transmit data to Ascaph within 20 days of receipt. These penalties apply to year of discrepancy and to the 5 succeeding years.

Confidential treatment will be given all FCC Form 324 data received by Ascaph.

Auditing, Audit Adjustments, and Late Payments

Auditing—Ascaph has the right to audit Station books and records to the extent necessary to verify any statement of account required of the Station, or any statement of a network in connection with co-op programs made available to the Station. All such auditing will be on a confidential basis (Lic. 8, p. 17).

Audit Adjustments—All audit adjustments are to be made using the division between basic net receipts and increment applicable to the year to which the adjustment relates. Generally, for 1968 and subsequent years, amounts paid pursuant to adjustments will be included in the industry-wide revenue base in the year when paid. Audit adjustments for the years prior to 1967 will not be included regardless of when paid, and audit adjustments for 1967 will be included only if paid within 120 days (or, if Ascaph so elects, in any instance, 180 days) after Ascaph has sent a notice of deficiency pursuant to the agreement (Ltr 10, pp. 14-15).

Late Payments—Late payments of license fees are to be made using the division between basic net receipts and increment applicable to the year for which the license fees were due. The amount of the payment will be included in the industry-wide revenue figures in the year in which paid, but only for payments relating to years beginning with 1968 (Ltr 11, p. 15).

Renewal

License will be renewed for an additional period, January 1, 1974 thru December 31, 1977, unless:

Station terminates by written notice to Ascaph on or before December 31, 1972; or

Ascaph terminates by written notice to Station on or before February 28, 1973 (Lic. 10, p. 17).

Legal Matters

Construction—The meaning of provisions of the agreement are to be construed in accordance with New York law (Lic. 14, p. 20).

Notices—Notices are to be given by registered U. S. mail sent to the main office of party being notified (Lic. 15, p. 20).

Assignment—The agreement is assignable, but the parties remain liable for obligations incurred prior to the effective date of assignment (Lic. 16, p. 20).

Breach by Station—If any breach is not cured within 30 days of notice in writing to Station, Ascap has the right to terminate license (Lic. 9, p. 17).

Force Majeure—The effects of major change in the industry are as follows:

Station may terminate on seven days' notice in the event of termination, suspension, or substantial alteration in terms and conditions of government licenses covering the Station, or any government action which substantially interferes with Station operations (Lic. 12, p. 20).

Ascap may apply to the Court for an order terminating this agreement in the event of: any major interference with operations of Ascap in Station's area by reason of any State or local law; or any substantial increase in cost to Ascap of operating in the Station's area by reason of any such law (Lic. 13, p. 20).

Counsel's Letter—The license and the letter have equal legal significance and should be read as a single document (Lic. 17, pp. 20-21).

Indemnity—Ascap will indemnify and hold Stations harmless from any claims arising out of the broadcast by Stations of Ascap music (Lic. 11, pp. 17-19).

United States District Court
Southern District of New York

UNITED STATES OF AMERICA,

Plaintiff,

against

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, et al.,

Defendants.

Civil Action
No. 13-95

In the Matter of the Application of
SHENANDOAH VALLEY BROADCASTING, INC., et al.,
Petitioners,
For the Determination of Reasonable License Fees.

FINAL ORDER

Petitioners, Shenandoah Valley Broadcasting, Inc., et al., (hereinafter "Petitioners") having applied to the Court for determination of a reasonable license fee pursuant to Section IX of the Amended Final Judgment herein, and the petitioners and respondent having agreed, after numerous hearings and conferences with the Court and lengthy negotiations between the parties and with the aid of the Court, upon forms of license agreement commencing January 1, 1968 and on a basis of payment for the period January 1, 1962 through December 31, 1967, and the petitioners and respondent having agreed that such forms of license agreement conform with the provisions of the Amended Final Judgment herein and that such forms of license agreement may be entered into lawfully by each party to this proceeding, and the entry of this order to carry out and consummate the negotiated agreement they have reached having been consented to, and notice of the settlement of this order having been given to the United States of America,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The following are reasonable and nondiscriminatory fees for the Local Station Blanket Television License Agreement for the periods indicated, and comply with the terms of the Amended Final Judgment entered herein:

a. for the period January 1, 1962 through December 31, 1967 the license fees set forth in the form of Local Station Blanket Television License Agreement in effect prior to January 1, 1962, a copy of which is annexed hereto as Exhibit 1, except that:

(i) for the period January 1, 1964 through December 31, 1967 the sustaining fee shall be 70% of the sustaining fee provided for in subparagraph 5A(a) of such license; and

(ii) for the period January 1, 1964 through December 31, 1965 the commercial fee shall be 2% (instead of 2.05%) of the station's "net receipts from sponsors after deductions" computed in accordance with the provisions of subparagraph 5A(b) of such license; and

(iii) for the period January 1, 1966 through December 31, 1967, the commercial fee shall be 2% of the "station's basic net receipts" and 1% of the "station's increment." For the purpose of this computation, the station's "net receipts from sponsors after deductions" shall be computed in accordance with the provisions of the license annexed hereto as Exhibit 1, and shall be divided between "station's basic net receipts" and "station's increment" in accordance with the provisions of subparagraphs 5E and 5F of the form of Local Station Blanket Television License Agreement annexed hereto as Exhibit 2.

b. for the period January 1, 1968 through December 31, 1977, the license fees set forth in the form of Local Station Blanket Television License Agreement annexed hereto as Exhibit 2, subject, with respect to the period January 1, 1974 through December 31, 1977, to the election by petitioners and respondent to renew and extend such license agreement as provided in paragraph 10 thereof.

2. The license fees set forth in the form of Local Station Per Program Television License Agreement annexed hereto as Exhibit 3 are reasonable and nondiscriminatory fees for the license granted by such agreement for the period January 1, 1962 through December 31, 1967 and for the period commencing January 1, 1968 subject, with respect to the period January 1, 1974 through December 31, 1977, to the election by petitioners and respondent to renew and extend such license agreement as provided in paragraph 13 thereof, and comply with the terms of the Amended Final Judgment.

3. Within thirty days after the entry of this order, respondent shall mail forms of Local Station Blanket Television License Agreement and Local Station Per Program Television License Agreement for the period commencing January 1, 1968 (Exhibits 2 and 3) to each petitioner except those specified in paragraph 5 hereof, together with a letter of transmittal (Exhibit 4), and said petitioner, if it so elects, shall sign and return either of such agreements and letter to respondent at its office at 575 Madison Avenue, New York, N. Y. 10022.

4. Within thirty days after the entry of this order, respondent shall notify each petitioner, except those specified in paragraph 5 hereof, of the license fees payable by such petitioner for the years 1964 through 1967 pursuant to subparagraph 1(a) of this order, based on the amounts reported by such petitioner for such years. In the event that the license fees payable to respondent for the years 1964 through 1967 pursuant to subparagraph 1(a) of this order are less than the interim license fees previously paid by such petitioner for such years, respondent shall notify such petitioner of the refund to which it is entitled. Respondent shall make such refund in accordance with the following provisions:

a. Respondent shall refund to such petitioner (i) not less than 60% of such difference on or before December 1, 1969; (ii) not less than 20% of such difference on or before December 1, 1970, and (iii) any balance on or before December 1, 1971.

b. In the event that a petitioner indisputably owes license fees to respondent, respondent may withhold not more than 50% of the refund which would otherwise be due to such petitioner until such license fees are paid, provided that either party may apply to this Court to determine whether such petitioner indisputably owes license fees to respondent. A finding by the Court in any such proceeding shall be used solely for the purpose of determining whether respondent properly withheld payment of such refund to such petitioner, and shall not constitute a construction of the license for any other purpose or be used or relied upon by either party in any other Court or proceeding.

c. In the event that such difference is not refunded or withheld in accordance with subparagraphs (a) and (b), each petitioner may credit the amount of the refund to which it is entitled against its payment or payments to respondent due immediately after the date on which the refund payment was due.

d. Nothing in this order shall be deemed to modify any settlement between respondent and any petitioner with respect to license fees payable by such petitioner for the years prior to 1968.

5. The provisions of this order shall not be construed as directing respondent to enter into any license agreement with any petitioner which, as of the date of this order, is in default in the submission of reports for more than two months, or has submitted such reports but failed to pay the license fees set forth therein for more than two months; provided, however, that if any such petitioner, within sixty days after written demand by respondent, shall make payment of all such license fees and shall submit all such reports, then respondent upon application shall offer, within a reasonable time thereafter, a license agreement to such petitioner in accordance with paragraphs 1 and 2 of this order, and provided that either party may apply upon notice to this Court for other or further relief as to petitioners which have not made payment of all such license fees and submitted all such reports within such sixty day period.

6. In the event of the failure of any petitioner or respondent to comply with any provisions of this order, the other party or parties may apply upon notice to this Court at the foot of this order for appropriate relief.

b. for the period January 1, 1968 through December 31, 1977, the license fees set forth in the form of Local Station Blanket Television License Agreement annexed hereto as Exhibit 2, subject, with respect to the period January 1, 1974 through December 31, 1977, to the election by petitioners and respondent to renew and extend such license agreement as provided in paragraph 10 thereof.

2. The license fees set forth in the form of Local Station Per Program Television License Agreement annexed hereto as Exhibit 3 are reasonable and nondiscriminatory fees for the license granted by such agreement for the period January 1, 1962 through December 31, 1967 and for the period commencing January 1, 1968 subject, with respect to the period January 1, 1974 through December 31, 1977, to the election by petitioners and respondent to renew and extend such license agreement as provided in paragraph 13 thereof, and comply with the terms of the Amended Final Judgment.

3. Within thirty days after the entry of this order, respondent shall mail forms of Local Station Blanket Television License Agreement and Local Station Per Program Television License Agreement for the period commencing January 1, 1968 (Exhibits 2 and 3) to each petitioner except those specified in paragraph 5 hereof, together with a letter of transmittal (Exhibit 4), and said petitioner, if it so elects, shall sign and return either of such agreements and letter to respondent at its office at 575 Madison Avenue, New York, N. Y. 10022.

4. Within thirty days after the entry of this order, respondent shall notify each petitioner, except those specified in paragraph 5 hereof, of the license fees payable by such petitioner for the years 1964 through 1967 pursuant to subparagraph 1(a) of this order, based on the amounts reported by such petitioner for such years. In the event that the license fees payable to respondent for the years 1964 through 1967 pursuant to subparagraph 1(a) of this order are less than the interim license fees previously paid by such petitioner for such years, respondent shall notify such petitioner of the refund to which it is entitled. Respondent shall make such refund in accordance with the following provisions:

a. Respondent shall refund to such petitioner (i) not less than 60% of such difference on or before December 1, 1969; (ii) not less than 20% of such difference on or before December 1, 1970, and (iii) any balance on or before December 1, 1971.

b. In the event that a petitioner indisputably owes license fees to respondent, respondent may withhold not more than 50% of the refund which would otherwise be due to such petitioner until such license fees are paid, provided that either party may apply to this Court to determine whether such petitioner indisputably owes license fees to respondent. A finding by the Court in any such proceeding shall be used solely for the purpose of determining whether respondent properly withheld payment of such refund to such petitioner, and shall not constitute a construction of the license for any other purpose or be used or relied upon by either party in any other Court or proceeding.

c. In the event that such difference is not refunded or withheld in accordance with subparagraphs (a) and (b), each petitioner may credit the amount of the refund to which it is entitled against its payment or payments to respondent due immediately after the date on which the refund payment was due.

d. Nothing in this order shall be deemed to modify any settlement between respondent and any petitioner with respect to license fees payable by such petitioner for the years prior to 1968.

5. The provisions of this order shall not be construed as directing respondent to enter into any license agreement with any petitioner which, as of the date of this order, is in default in the submission of reports for more than two months, or has submitted such reports but failed to pay the license fees set forth therein for more than two months; provided, however, that if any such petitioner, within sixty days after written demand by respondent, shall make payment of all such license fees and shall submit all such reports, then respondent upon application shall offer, within a reasonable time thereafter, a license agreement to such petitioner in accordance with paragraphs 1 and 2 of this order, and provided that either party may apply upon notice to this Court for other or further relief as to petitioners which have not made payment of all such license fees and submitted all such reports within such sixty day period.

6. In the event of the failure of any petitioner or respondent to comply with any provisions of this order, the other party or parties may apply upon notice to this Court at the foot of this order for appropriate relief.

7. In the event that respondent and the "All-Industry Television Station Music License Committee" as attorney-in-fact for petitioners and other local television stations similarly situated do not agree on the computations of "basic net receipts" and "increment" applicable to any of the years 1968 through 1977, an application may be made to this Court at the foot of this order for determination of such dispute.

8. In the event of:

a. any major interference with the operations of respondent in the state, territory, dependency, possession or political subdivision in which a particular station is located, by reason of any law of such state, territory, dependency, possession or political subdivision; or

b. any substantial increase in the cost to respondent of operating in a state, territory, dependency, possession or political subdivision in which a particular station is located by reason of any law of such state, territory, dependency, possession or political subdivision, which is applicable to the licensing of performing rights,

respondent may apply to this Court for an order terminating the license of such station.

Dated: July 28, 1969
New York, New York

SYLVESTER J. RYAN
U. S. D. J.

We consent to the entry of
the foregoing order.

July 28, 1969

DONALD SCHAPIRO
Attorney for Petitioners

ARTHUR H. DEAN
HERMAN FINKELSTEIN
Attorneys for Respondent

1968

USE DOLLARS ONLY - OMIT CENTS

CALL LETTERS

SCHEDULE 1. BROADCAST REVENUES			
LINE NO.	CLASS OF BROADCAST REVENUES (a)	AMOUNT— (b)	AMOUNT (c)
1	A. REVENUE FROM THE SALE OF STATION TIME:	\$	\$
2	(1) Network -		
3	Sale of station time to networks:		
4	Sale of station time to major networks, ABC, CBS, MBS, NBC (before line or service charges) (4)		
5	Sale of station time to other networks (before line or service charges) (5)		
6	Total (lines 4-5) (6)		
7	(2) Non-network (after trade discounts but before commissions to agencies, representatives, and brokers, or cash discounts to advertisers and others) -		
8	Sale of station time to national and regional advertisers or sponsors (8)		
9	Sale of station time to local advertisers or sponsors (9)		
10	Total (lines 8-9) (10)		
11	Total sale of station time (lines 6 and 10) (11)		
12	(3) Less commissions (including cash discounts) to agencies, representatives, and brokers but not to staff salesmen or employees (12)		
13	Balance, amount retained from sale of station time (line 11 minus line 12) (13)		
14	B. INCIDENTAL BROADCAST REVENUES (after deduction for commissions):		
15	Sale of talent under contract and commissions, fees, and profits from obtaining or placing talent (15)		
16	Furnishing material, service, or facilities (16)		
17	Other (17)		
18	Total incidental broadcast revenues (lines 15-17) (18)		
19	Total broadcast revenues (lines 13 and 18) (19)		
20	POLITICAL BROADCASTS		
21	Revenue (after discounts and before commissions) from all political broadcasts (including announcements) by or on behalf of candidates, excluding amounts received from major national networks (ABC, CBS, MBS, NBC) (21)		
22	JOINT AM-FM REPORTS		
23	If this is a report for a joint AM-FM operation, indicate below the amount, if any, of total broadcast revenues in line 19 which is applicable separately to the FM station:		
	1. FM revenues from sale of station time (after discounts, commissions, etc.) ^{2a} (23a)		
	2. FM revenues from providing functional music or other special services (23b)		
	3. Other FM revenues (23c)		
	4. Total (lines 1 - 3) (23d)		

INSTRUCTIONS FOR COMPLETION OF FCC FORM 324

Revised December 1967

ANNUAL FINANCIAL REPORT OF
NETWORKS AND LICENSEES OF BROADCAST STATIONSGENERAL INSTRUCTIONS

1. Who must file reports? All networks and licensees of broadcast stations and all permittees whose stations were operated during the year covered by this report. In the later instructions, the term "licensee" is used for convenience to refer to respondents as so defined.
2. What reports must be filed?
 - (a) One report shall be filed for each network and for each station of the licensee, whether AM, FM, TV, or other type of station.
 - (b) If the licensee operates a joint AM-FM station in the same community, one report may be filed covering the joint operation.
 - (c) If the licensee operates an AM and a TV station in the same community, a separate report shall be filed for each of the stations.
 - (d) Only one copy of report for each network and each station need be filed.
 - (e) When report forms are mailed to networks, special instructions will be furnished to adapt the form to meet their requirements.
3. What is the time period covered by the report? The report must cover the full calendar year to which it refers. If respondent's station was operated for part of the year under other ownership, the present and former licensees must file reports covering their respective periods of operation. Licensees are expected to file reports covering the period of the year for which they actually operated. It is the responsibility of the present licensee to make sure that the former licensee has filed a report for his period of operation.
4. When is report to be filed? On or before April 1.
5. What special provision is made for licensees with revenue under \$25,000? A respondent operating a commercial broadcast station and deriving total revenue from the sale of time of less than \$25,000 for the year under report, or less than an average of \$500 weekly if in operation for less than the year, is required to complete only Schedules 3, 4 and 5.
6. What special provision is made for non-commercial broadcast stations? Respondents operating non-commercial stations and deriving no revenue from the sale of station time are required to answer only line 6 of Schedule 2, line 2 of Schedule 4 and Col. (b) of Schedule 5.
7. If the space provided for any schedule is insufficient or if it is necessary to insert additional statements, the insert pages shall be securely fastened in the report and shall be of durable paper conforming to this form in size and width of margin. Each insert shall bear the number and title of the schedule to which it pertains and the call letters.
8. If the licensee has more than one station and is unable to assign certain employees or certain items of income or expense to each station, he may allocate such employees or sums on a reasonable basis as among the stations as may be necessary.
9. Use dollar figures only. Cents should not be shown. Enter all sub-totals and totals.

INSTRUCTIONS FOR SCHEDULE 1 - BROADCAST REVENUES

This schedule is designed to show the revenue of the respondent which has been derived from all broadcast activities, segregated so as to indicate that which has been received from networks, that which is of a non-network character, that which has been received from incidental broadcast activities, and the extent to which those other than respondent participated in those revenues.

Lines 4 and 5 of the schedule are designed to include the gross amounts of revenue earned from networks as compensation for the time of the respondent which was used by such networks for broadcasting network commercial programs. These lines should include revenue only from networks providing programs to a station. Revenue received from so-called "selling networks" (organizations which sell the station's time but do not provide it with any programs) should be reported on lines 8 or 9, according to the type of advertiser to whom time is sold. "Sale of station time to networks" means the amount received or receivable by the station from networks. Amounts paid by the networks for circuit costs, royalties, and similar items of expense which they furnish under contract are includible in the expense statement of the network. If, on the other hand, the stations pay for these items, either directly or through networks, as an offset on amounts receivable, then such payments are includible in the expense statement of the station. These lines should not include revenue earned from the sale of network cooperative programs to non-network sponsors; the revenues retained by the stations after payments to the networks for such cooperative programs should be reported on lines 8 or 9.

Line 8 is designed to include the gross amount of revenue earned from advertising placed by or on behalf of advertisers generally recognized as national or regional in character. Usually this is the type of business commissionable to national representatives, but may be solicited directly by the respondent or through advertising agencies, brokers, or networks. Line 9 of the revenue statement is designed to include all other gross revenue earned from time sales. The distinction between line 8 and line 9 is based on the type of advertiser to whom the time is sold rather than how or by whom it is sold. Amounts reported on lines 8 and 9 are not to be reduced by cash discounts or amounts paid as commissions to advertising agencies, national representatives, and brokers, or to staff salesmen or employees.

Line 15 is designed to include the gross amount earned by the respondent from others as compensation for services of talent which is under contract to and in the pay of respondent; and net commissions, fees, and profits for services in obtaining, or for placing with others talent not under contract to and in the pay of respondent.

Line 16 is designed to include amounts earned by the respondent from others for furnishing manuscript, transcription, production, other program material or service, charges for facilities and special charges in connection with remote broadcasts, charge for other program transmission circuit services, charge for use of studio facilities, etc.

Line 17 is designed to include all other incidental broadcast revenue such as, for example, revenue derived from the syndication of a program originally produced for use on the station.

Line 21 is designed to include all monies received by the respondent (after discounts and before commissions) from political candidates or their supporters for broadcasts by or on behalf of the candidates. Include charges for time, production, special facilities, etc. Exclude any amounts received from nationwide networks -- ABC, CBS, MRS, and NBC. Do not include revenue received from regular commercial sponsors whether it is for sponsorship of a political broadcast or for purchase of announcements on such a broadcast.

CORINTHIAN BROADCASTING CORPORATION 280 PARK AVENUE, NEW YORK, NEW YORK 10017, OX 7-9400

June 30, 1969

Mr. Alexander Korn, Chief
Research Branch
Research & Education Division
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

Dear Mr. Korn:

This will confirm our recent telephone conversations regarding FCC Form 324.

As you know, this form is referred to in the contract which the All-Industry Television Music Licensing Committee, of which I am chairman, is now negotiating with ASCAP. Thus, I want to be sure that my general understanding of the form is correct.

Your description of the Commission's position as to the purpose and reporting requirements of Form 324 generally confirms my prior understanding which goes back to Budget Bureau discussions of the mid-50's when I was on the NAB staff. It is my understanding that the Commission seeks to obtain the financial picture of each station's over-the-air broadcast activities. The report is not designed to include nonbroadcast activities.

Schedule 1 of Form 324 relates to revenue. It requires the reporting of data on the two basic sources of revenue: time sales (Lines 1-13) and revenue received from the sale of materials or services provided as an incident to such time sales (Lines 15 and 16). Such materials or services often include talent, program material, facilities, lines, rights, and the like, where they are an incident to the reporting station's over-the-air broadcast activity.

Mr. Alexander Korn

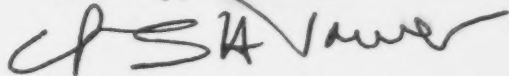
-2-

June 30, 1969

Not reportable on Schedule 1 are revenues unrelated to the station's over-the-air broadcast activities. Such revenues might include, for example, revenue from any of the following: studio rental for meeting purposes; furnishing manpower or equipment to another company (whether network, station, or a company not involved in broadcasting) where such revenue is not incident to the reporting station's sale of time; production of films or other material for industrial use; the production for another or at the request of another of television programs or commercials which are not intended primarily for the on-the-air use of the station itself; and similar activities. Also not reportable is revenue from the sale of programs produced by the reporting station primarily for syndication to others. However, revenue from the syndication of programs produced by the reporting station primarily for use on that station is reportable (Line 17).

It would be very helpful to the Committee if you could confirm the above understanding assuming, of course, that it is correct. Since we are trying to wind this matter up in Judge Ryan's court on Monday, July 14, it would facilitate our handling of the matter to have word from you by Monday or Tuesday, July 7 or 8. Some preliminary Committee work is necessary before the meeting in court on the 14th.

Sincerely,



Charles H. Tower

CHT:bb

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

July 3, 1969

IN REPLY REFER TO:

8900

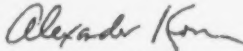
Mr. Charles H. Tower
Corinthian Broadcasting Corporation
280 Park Avenue
New York, New York 10017

Dear Mr. Tower:

This is in reply to your letter of June 30, 1969. Please be advised that your understanding is correct - the annual financial report (FCC Form 324) is designed to cover revenues and expenses pertaining to the stations' broadcast activities only. The "Incidental Broadcast Revenues" reportable on Schedule 1, lines 15, 16, and 17 are not supposed to include any revenues obtained by the station in return for services or facilities furnished in any activities not connected with broadcasts by the station. Incidentally, expenses for such non-broadcast activities should likewise be omitted from Schedule 2.

I trust this information will be helpful to your committee.

Sincerely yours,



Alexander Korn
Chief, Research Branch
Broadcast Bureau

Senator MATHIAS. Thank you very much.
Mr. Cramer.

STATEMENT OF EDWARD M. CRAMER

Mr. CRAMER. Thank you, Mr. Chairman.

For the purposes of the record, I would like it clear that BMI represents tens of thousands of writers from every State in the Union. I do not know them all, but I know many of them, some of whom are here in this room. I talked to many of them last night and all during the course of this pending legislation. I know of no writer that is affiliated with BMI that thinks this legislation would be good for him or her.

I think the basic question here is the one that the chairman asked at the outset. And that is what is the purpose of this legislation, the purpose of the copyright law?

The purpose of the copyright law is to stimulate creativity by providing economic incentive. I will not review that. You will find it in the statement of the Register of Copyrights and on pages 5 to 7 of my written statement.

Obviously the present law injures no one. The details are on pages 9 to 11 of my statements. Broadcasters are doing well, and that is fine with me. No problems with that.

But when they want to increase their profits by taking money out of the pockets of writers, that is not all right with me.

Now, as Mr. David said, every argument that has been advanced here has already been advanced in litigation. Now, I do not propose to suggest that the proponents have no right to come before the Congress and say change court decisions that we find unfavorable. But, I want to emphasize the point that was asked by Senator DeConcini, and I suggest to you was not answered, what about the facts as found by that court? And I say that the factual determination by the court of appeals is at variance with virtually every comment made here.

Now, Representative Boucher, who is not here, was wrong on many of the alleged facts that were given to him. And I cannot refute them all in this time limitation. But I would like to concentrate just on one, and then I will go off because the red light went on.

He said that the contracts between BMI and ASCAP are not negotiated. They are on a take it or leave it basis. That is totally false. In my nearly 20 years at BMI, I have negotiated four—negotiated four series of contracts with the television industry. None of them were on the take it or leave it basis. And the one that I negotiated less than a year ago with Mr. Arries, who is sitting over here, resulted in two major changes from the written proposal we submitted.

One, it resulted in a major reduction in the rate, so it was not on a take it or leave it basis. And that is in writing. And the other change was to agree to the proposal by the broadcasters that we submit any future rate dispute to a consent decree court. We agreed to that. They requested the Government intervention.

By the way, I had offered nongovernmental rate fixing, that is arbitration. They wanted judicial rate fixing, and got it. So, to say there was no negotiation, is totally incorrect.

I could go on further here, but I saw that you had your red light on.

So, thank you, Mr. Chairman.

[Submissions of Mr. Cramer follow:]

PREPARED STATEMENT OF EDWARD M. CRAMER

I am President and Chief Executive Officer of Broadcast Music, Inc. (BMI), a performing rights organization that represents the interests of more than 80,000 music writers and publishers. We oppose S. 1980 for the following reasons.

1. The purpose of the copyright law is to provide the economic incentive necessary to stimulate creativity. This legislation, which would change the copyright law, does just the opposite.

2. The present law injures no one. Television broadcasters, in particular, are currently enjoying the greatest period of prosperity in that industry's history.

3. The present law clearly benefits songwriters, publishers, music users - including broadcasters - and, ultimately, the public.

4. Every argument thus far advanced in favor of S. 1980 has already been judged by the courts. The legislation's proponents previously raised all of the same arguments in two major court cases, one of which went to the Supreme Court of the United States. In both instances they lost. After careful inquiry, the courts found the claims to be without merit.

The bill before you, if enacted, would initially reduce the economic incentive to the creators of music by tens of millions of dollars annually. Subsequently, virtually every U.S. songwriter, composer and publisher would suffer severe economic harm. Obviously, if the bill is enacted, the next step will be to extend it to encompass network television, cable, public broadcasting and, eventually, all syndicated radio programming.

There is also no question that, based upon the internationally accepted concept of reciprocal treatment, our performing rights colleagues from abroad will quickly reduce their payments to U.S. writers and publishers. Currently in this respect, the United States enjoys a very favorable balance of trade.

In our view, the matter is not one that requires legislation. It is a market place issue that can - and should - be resolved at the negotiating table.

My name is Edward M. Cramer. I am President and Chief Executive Officer of Broadcast Music, Inc., a performing rights organization that currently represents the interests of nearly 80,000 writers and publishers. I submit this statement in their behalf in opposition to S. 1980.

My tenure with BMI as its President has spanned nearly two decades and, for a number of years prior, I was involved in various legal aspects of the entertainment business that involved the copyright law. I represented leading writers and publishers (both music and literary); recording companies, motion picture interests, advertising agencies, etc. I was a founder and have been active in the Copyright Society of the U.S.A. for more than 30 years.

As experienced legislators, I'm sure you'll agree that among those factors that need to be considered before a law is changed, are the following:

- I What is the real purpose of the law whose change we are now contemplating?
- II Does it presently injure anyone?
- III Whom does it presently benefit?
- IV What arguments have been made in favor of change?

I THE PURPOSE OF THE COPYRIGHT LAW

The proposal before you, today, does not have to do with the creation of a new law. What we are considering, instead, is whether or not the current copyright law which took effect in 1976, and was itself a revision of the preceding 1909 copyright law, should be revised. That revision took nearly 20 years of research and debate with volumes of studies and transcripts of hearings. Yet it is significant that the substance of S. 1980 was never discussed!

The background of the law, can be found in the Constitution of the United States. Article I, section 8. Congress was authorized "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries."

Consider those words for a moment. For whom was Congress authorized "to promote the Progress of Science and useful Arts..."? The answer is fairly obvious...for the general public.

I hope you share the view of our forefathers. All of us benefit from new inventions, new writings, new pieces of music and new works of art. The creators of these things, however, have the same needs as you and I. They, too, need money for food, shelter and clothing. They do not live in an economic vacuum free from everything other than a need to create things that enhance our lives. Therefore, if the general public is to continue to be benefited by a constant supply of creative product, then the creators themselves need to be encouraged. In short, they need assurance that they can earn a living from their creativity.

It may seem very crass, but I am reasonably certain that, without the Copyright Law...without some way of assuring a

reasonable return on one's creativity, we would have far fewer libraries because there would be fewer books to fill the shelves. There would be few, if any, art galleries because there would be no pictures to line their walls. And, I hasten to add, there would be far, far fewer broadcast stations if there were no longer an almost unlimited supply of program product.

The above views are not original with me. They have been repeated by the Supreme Court on almost every occasion it decided a copyright case. I quote below from the opinion of the Supreme Court of the United States in Sony Corporation of America et al. v. Universal City Studios, Inc. et al., 464 U.S. 417 (1984).

"Article I, Sec. 8 of the Constitution provides that:

'The Congress shall have Power...to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.'

- 2) "The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired. (underscoring added)

'The copyright law, like the patent statute, makes reward to the owner a secondary

consideration. In *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127, 13 USPQ 243 244, Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress,

"The sole interest of the United States and primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors'. It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius". United States v. Paramount Pictures, 334 U.S. 131, 158, 77 USPQ 234, 253.'

I will not burden you with additional citations, but if you would like a bibliography of them, I will gladly provide it.

It seems absolutely clear that the proposed legislation cannot stimulate creativity and it may or may not reduce the amount that broadcasters pay for programs they use. Music, incidentally, is only a miniscule part of that cost - about 1% of their gross revenues. However, if the broadcasters save anything, then it must, of necessity, come from the pockets of those who toiled to create the music. Any reduction of income to the creator simply means that his or her incentive to create will also be reduced. In my view, this is neither in the public interest nor in keeping with the fundamental principles of the Constitution.

It is important to recognize that the concept of copyright is that the owner owns a "bundle of rights" - each separate.

For example, the owner of a book has many rights. The fact that you can purchase a novel for \$14.95 does not give you the right to make a play or a film from it, to record it, to serialize it in newspapers or magazines or to print paperbacks.

Likewise with the owner of the copyright in a musical work. The fact that you purchase sheet music does not give you the right to record it, to make and print your own arrangements or to perform it publicly. And this last right, the right of public performance, is nearly a century old.

The proposed legislation would weaken, if not destroy, the 'separate performing right. It would challenge the entire concept of the divisibility of copyright in all areas of creativity.

II DOES THE PRESENT SYSTEM INJURE ANYONE?

I suggest that before enacting "remedial" legislation, there is a threshold question that should be addressed. Who has the present system injured? In my view, the question can be answered with a single word...nobody! Absolutely no one has been injured and that includes the system's most vocal group of detractors - the television broadcasters, themselves.

I won't deny that the television broadcasters are "claiming" injury, but what evidence exists? Can any one TV broadcaster claim that he is in financial difficulty because of the miniscule amount he is paying for music license fees? How about the industry itself, is that in trouble?

"The traceable dollar value of broadcasting stations changing hands in 1965 was an astronomical \$5,668,261,073, double the previous record for a year of station trading. And the 1985 figure substantially understates the true worth of

transfers...". That was a direct quote from one of the industry's most prestigious trade publications...Broadcasting Magazine in its issue of January 27, 1986.

A similar view of an "injured" or "ailing" industry appeared in the January 28th issue of Broadcaster Investor. "...the estimated dollar value of station sale announcements in 1985 was nearly triple the previous peak in 1983 and more than 10x the 'mere' \$1.2 billion just four year before."

Finally, in a story reporting on the sale of WOR-TV in New York for approximately 20 times its cash flow, The New York Times commented, "well run independent stations can post profit margins of as high as 40 percent."

Does this sound like a sick industry in need of federal legislative aid? I think not!

Incidentally, I ask you all to consider for a moment what it is that these stations are selling for such immense profit? Is it something they own or is it something that you and I really own? In my view, it's the latter. What they are really selling - and for incredible profit - is access to the public airwaves. According to a commentary that appeared at the end of February (2/27/86) in the Wall Street Journal, "In the past year, private investors made close to \$10 billion selling broadcasting rights owned by the U.S. Government. The Treasury received nothing."

III WHOM DOES THE PRESENT LAW BENEFIT?

In the long run, as I have already said, the primary beneficiary of any copyright law is the general public. On a more immediate level, however, it is the creator who benefits.

And, since our primary concern, today, is with one specific group of these creators - those whose music is used for television - let us look at some of them.

To begin with, the writers whose music is used on television fall generally into two large groups. The first consists of men and women who write music intended as a primary focus of attention. We call this feature music and the bulk of it is not written with a particular program in mind. The country hits you hear on Hee Haw, the easy listening music on a Lawrence Welk Show or the current hits of American Bandstand are all representative of feature music.

The second category is a group whose music is far more difficult to appreciate. These are the television theme and background music writers and often the contribution they make is designed to be subtle...to unobtrusively carry a scene or set a mood. With a few notable exceptions, background music is intended to be almost subliminal and the viewer is more likely to miss its absence rather than being aware of its presence.

By necessity, the composers in this grouping are especially skillful and, though often not so well known to the public as their feature music counterparts, are extraordinarily well schooled and versatile. Among them are:

John Williams, a multi-Oscar winner who currently conducts the Boston Pops Orchestra and comes from a background of classical study with Rosina Levine at the Juilliard School of Music. His television credits include Checkmate, Lost In Space, Time Tunnel, Tales of Wells Fargo and Gilligan's Island among many others.

Jack Elliott, is a graduate of Hartt College of Music, University of Hartford, who studied composition with Lukas Foss and Bohuslav Martinu. He began his career as a dance arranger for such Broadway hits as Fiorello and She Loves Me. Later, he arranged for Judy Garland and was music director for The Andy Williams Show before achieving success as a composer of television background music (Charlie's Angels, Barney Miller). He was the founder, and is currently Musical Director, of The New American Orchestra. Under his direction, it has performed in concert at Carnegie Hall, The John F. Kennedy Center for the Performing Arts and the Hollywood Bowl and many other concert settings.

Lalo Schifrin, received classical training under his father, Luis Schifrin, concert master of the Philharmonic Orchestra of Buenos Aires. Later, in Paris, he studied classical music by day and, at night, was a jazz pianist. His first claim to fame, in fact, was as a pianist with Dizzy Gillespie. His music received Emmy nominations for several television series; Mission: Impossible, Mannix and Starsky & Hutch. His concert works have been commissioned and performed by - among others - The Carnegie Hall Chamber Orchestra, The Los Angeles Philharmonic, The Robert Wagner Chorale and the Israel Philharmonic Orchestra. Additionally, he has conducted the Los Angeles Philharmonic, the Orchestra of Radio Cologne and many major civic orchestras.

The late Nelson Riddle played with the Charlie Spivak and Tommy Dorsey bands before he went on to become an arranger for greats like Frank Sinatra, Peggy Lee, Nat "King" Cole and Judy Garland. He was also Music Director for the inauguration ceremonies of John F. Kennedy in 1961 and, in 1985, President Reagan. His television credits include Newhart, Hotel, Matt

Houston, Emergency! and The Man From Uncle. Opera star Dame Kiri Te Kanawa, who recorded with Riddle just prior to his passing said, "Nelson Riddle is a genius. I'm working with people like Leonard Bernstein and Sir Georg Solti - whom I consider gods, and Riddle happens to be one of them."

Another example - and by no means the last - is Billy May. He came from the swing bands of Charlie Barnet and Glenn Miller. His television credits include Mod Squad and Emergency and his theme for the series Naked City.

Dozens of other composers are equally at home in the concert hall as on the sound stage. Among them is the writing team of Mike Post and Pete Carpenter. (A separate statement is being submitted on their behalf.)

Academia, too, has contributed to this category. Frank Lewin, a noted composer of background music for documentaries and syndicated series like The Defenders and The Nurses is an Adjunct Professor at both Yale and the Columbia University School of the Arts. And, according to Professor Lewin, "The most talented and proficient of today's composers are working on the West Coast, scoring for theatrical and television products. Their work is on a par with that being done by any concert composer and their training by necessity is on a par with that of any of the top professions: medicine, law, etc."

How do these people - and countless others like them - benefit from the present payment system?

The current industry practice is one that evolved over a great many years. Between the composer and program producer the conventional employer/employee relationship does not exist. In today's industry practice, the composer is paid a relatively

small fee up front, but its minimal size is counter-balanced by the fact that the composer retains all of his or her performing rights.

There are several great advantages to this system. First and foremost, it assures the composer of a continuing source of income if the program is successful. The more the product is used, the greater the royalty payment earned. Of course, the converse is more often true, but background music writers - like so many other people - tend toward eternal optimism.

Secondly, it frees both writer and producer from the impossible task of determining the worth of a product before it's been marketed. I don't think anyone, for example, could have predicted the continuing popularity of "Star Trek" before the first program pilot was even viewed.

And finally, the system produces at least one significant fringe benefit. Since there is no need to pay a great deal of money up front, small, low-budget producers can afford the same high musical quality as the big budget producers.

IV WHAT ARGUMENTS HAVE BEEN MADE IN FAVOR OF CHANGE?

The proponents have the heavy burden - in this case an extremely heavy burden - of demonstrating why a system that works so well should be changed.

As already shown, they cannot demonstrate any economic harm. The market for TV stations is booming - it's a sellers market.

Instead they argue that since the station acquires all

other rights, when it "buys" the show why can't it obtain the performing rights as well?

The answer is simple. It can! BMI and ASCAP get only "non-exclusive rights" from their writers and publishers. Therefore, if the marketplace demands that the performing rights be conveyed at the same time as synchronization rights (the right to record the music on tape or film) it can be done today. No legislation is necessary!

The proposed legislation would, however, eliminate this choice and force all users and all suppliers to do business only by source licensing.

The fact of the matter is that even though the option is available, few stations if any, have opted for it. And why? Simply because the present system works.

The bill's proponents also argue that movie theaters don't require a separate performing rights license. Why, then, should broadcasters be required to do so?

This is a very slick, superficial argument.

As a matter of law, theaters are not exempt from obtaining a performing rights license. It is only as a result of marketplace economics that have developed since 1948, that they do not have to obtain such licenses.

History provides the answer to this anomaly. In 1948, in two civil anti-trust cases, ASCAP was judged to have violated the anti-trust laws in its licensing of theaters. As a result, the ASCAP consent decree was amended and ASCAP and its members were prohibited from licensing motion picture theatres. It was

in effect a penalty against the guilty parties. The copyright law was not changed in 1948 nor when it was rewritten in 1976 was there a prohibition against licensing theaters.

Perhaps what we really should question is why, in logic and equity, should non-ASCAP writers and publishers be penalized today for something which ASCAP and its members did nearly 40 years ago. There was no judicial determination then or since that BMI or its writers and publishers violated the anti-trust laws with respect to films or in any other media. Indeed, why should generations of ASCAP members who weren't even born at the time be penalized today?

But unfairness aside, how does one make the leap from ancient illegal conduct in the film industry to current TV practices?

The fact is that the proponents tried to show in several major law suits that the ASCAP and BMI TV practices were violative of the anti-trust laws. They lost each time and that is something they cannot accept.

The proponents of the bill have circulated colorful, imaginative charts claiming that the bulk of local television payment goes to only a few composers and publishers. Quite simply, they are playing with numbers!

BMI and ASCAP are required, by consent decrees, to accept virtually any writer or publisher who wants to join. As a result, each organization has a large number of writers who can only be considered hobbyists and whose works are rarely - if ever - performed. The theory behind the "open door" policy, however, is an affirmative one; it is designed to offer opportunity to collect performance royalties to anyone having a work which might be performed.

Even of those active songwriters, however, it should be obvious that only a comparative few enjoy conspicuous success. There is, after all, only limited room at the top. But this is true in any field of endeavor and certainly in any field of creative activity. Only a small percentage of the artists who put brush to canvas or the writers of books earn substantial monies for their efforts. As a concrete example, in England there is a Public Lending Right which - through a sampling system - provides registration authors with royalty-like payments for books borrowed from public libraries. Of the 11,307 authors registered, last year, only 63 received maximum payment while 1650 - nearly 15% - received no payment at all.

Finally, and still on the subject of concrete numbers, only about 160 corporate entities own the top 600 television stations. Does this mean that the stations should be required to give their time to sponsors without charge? That is exactly what is being asked of writers and publishers!

If Congress were to legislate primarily in terms of how many people benefit from a particular business activity, then it must be argued that the number of people benefiting economically from local television's use of the public airwaves is only a minute fraction of the total U.S. population. Obviously, the flawed reasoning of such a suggestion is equally applicable to playing a numbers game with composers.

The proponents claim that under the present system there is no economic incentive for them to exercise the right which they presently acknowledge they have either to engage in source licensing or direct licensing. They claim they would be required to pay BMI the full amount of the blanket license with no reduction for those programs which they have cleared. The

right to reduce their revenue on which they pay BMI for cleared programs is known as a "carve-out".

This argument has superficial appeal but again an examination of the history of the relationship between the television broadcasters and BMI as was done by the court in the Buffalo Broadcasting case (744 F 2d 917 (2nd Cir 1984) (certiorari denied) shows that it is completely without merit.

In fact the broadcasters had such a right for 22 years and never utilized it. As the court opinion in the Buffalo case noted:

"The stations showed no interest in source licensing even during the period from 1950 to 1972 when the "carve-out" provision of the blanket license issued by BMI permitted a station to deduct from the revenue base of the blanket fee the revenue from programs for which music performing rights were cleared at the source, whether or not clearance was accomplished by licensing from BMI."

I testified under oath at the trial that it was the broadcasters who insisted that the "carve-out" provision be removed from the then new contract which became effective in 1972. My assertion has never been challenged. In fact the current contract between television broadcasters and BMI contains no "carve-out" even though it was tendered to them by BMI.

The "carve-out" remains a matter to be negotiated and certainly does not justify the kind of drastic revision which is before this subcommittee.

Another argument made by the proponents is that the film studios - the program producers or syndicators - are

dissuaded from even considering source licensing because so much money is currently returned to them via performance payments made to the publishing companies they own. The proponents have characterized these payments as "kick-backs", but, regardless of the phrasing they have used to describe the payment system, they seem blind to the fact that they are also applying a double standard of judgment. Clearly, if it is wrong for publishing firms owned by motion picture companies to be paid for their efforts, then is it not also wrong for those publishing firms - and there are a number of major ones - who are owned by broadcasting entities?

The basic allegation, however, is without merit. In 1984, the Court of Appeals for the Second Circuit in Buffalo Broadcasting et al. v. ASCAP and BMI et al. (744 F 2d. 917) considered this same charge and concluded, "The undisputed evidence shows that these fees are far too small to persuade syndicators to refuse to undertake source licensing in the face of reasonable offers." (Emphasis added)

Indeed, every argument made by the proponents has been made and considered before in the Buffalo case.

In its decision, the court was unanimous. In addition, Judge Winter, an anti-trust specialist before he was appointed to the bench, wrote a separate concurring opinion in which he said:

"I write separately because I believe that it demonstrates that the blanket license as presently used cannot have an anti-competitive effect." (Underscoring added)

He then went on to caution the TV industry against "future needless litigation over blanket licenses in the music industry".

Certainly the proponents have the right to seek legislative reversal of what they view as an unfavorable decision but they have a burden which they simply haven't attempted to meet. Instead they merely repeat the arguments and allegations that were rejected. Repetition doesn't lend validity to them.

CONCLUSION

The bill before you, if enacted, would reduce the economic incentive to creators by tens of millions of dollars annually. But that is just the beginning. If enacted, virtually every writer and publisher in the U.S. would suffer severe economic harm because it is obvious that the next step will be to extend the legislation to encompass network television, cable, public television and then syndicated radio programs. I can also assure you that based upon the internationally accepted concept of reciprocal treatment our colleagues from abroad will quickly reduce their payments to U.S. writers and publishers. I might add that in this respect the United States enjoys a very favorable balance of trade.

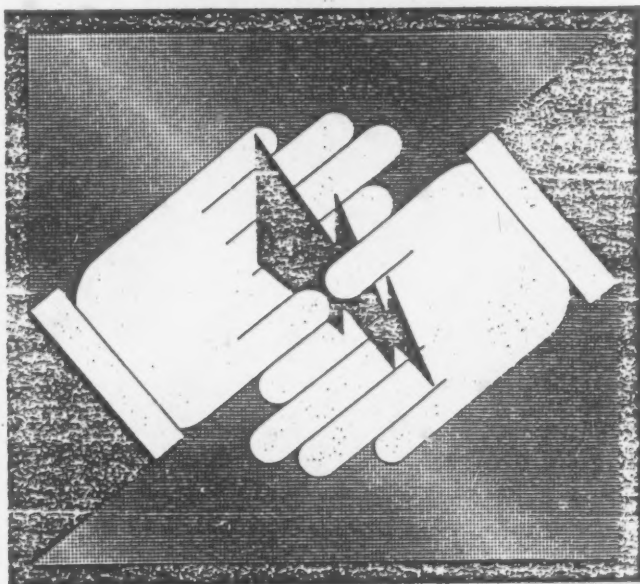
In summary, there are really only two issues before this subcommittee. The first is obvious - should the creators of music be deprived of the major economic incentive for their creativity? But there is a second, underlying question that is, initially, even more important. Is this really a matter with which you should concern yourselves?

There is little doubt in my mind that, after everyone has had his or her say, you will conclude there is only one basic thread running throughout - money! We've said it from the outset. If this bill becomes law, the people we represent stand to lose a great deal of money. Conversely, though they have been far less direct in stating their motives, the bill's proponents are primarily interested in saving a substantial amount of money.

The underlying question, therefore, is why should this august body be asked to intervene in what is essentially a marketplace matter? Isn't this really an issue that can - and should - be resolved at a negotiating table?

* * *

Special Report



Changing Hands 1985

Broadcast station sales go through the roof
Transactions total more than \$5 billion
Another record for cable deals

The traceable dollar value of broadcasting stations changing hands in 1985 was an astronomical \$5,668,261,073, double the previous record for a year of station trading. And the 1985 figure substantially understates the true worth of transfers that included major groups lumped with other assets in corporate takeovers, mergers and buyouts for which only gross prices are known.

Never had there been a year of such tumultuous selling and buying. The companies owning two of the three television networks were sold, and the owner of the third was restructured to avert a takeover. Involved in the buying and selling were many of the major groups: Storer, Cox, Evening News Association, Gulf, Taft, Times Mirror, Group W, Gannett, Hearst, Tribune, Scripps Howard. Springing into prominence were such newcomers as Rupert Murdoch, Kohlberg Kravis Roberts & Co. and Price Communications.

This year, new records were set in FM stand-alones, AM-FM combinations and TV stations. Not only were the deals bigger, there were more deals in major markets coast to coast. In every market in the top 11 and all but one in the top 23, at least one TV station changed hands. Five TV stations were traded in Los Angeles, four in New York and Chicago, three in Washington.

The largest sales of last year could not be evaluated since they involved the transfer of station groups along with extensive other interests. Without including the transfer of NBC stations to General Electric, ABC to Capital Cities, Storer to KKR, the Evening News Association to Gannett and Cox to private status by its founding family, the 1985 total for AM stations, FM stations, AM-FM combinations, VHF and UHF television and radio-TV groups sold was \$5,668,261,073. The previous yearly record was set in 1983, when

STATION AND CABLE TRADING

\$2.3-billion worth of properties changed hands. The figure for 1984 was \$2.1 billion.

The effect of the FCC's relaxation of ownership limits for broadcast properties generating new buyers from old companies accounts for a large portion of the upturn in stations totals, but the biggest reason was the sudden realization of the financial community of the profitability of broadcast properties, resulting in the wide availability of money for broadcast acquisitions. The volatility of the market was emphasized by KKR's sale of KTLA(TV) Los Angeles, an inde-

pendent VHF, to the Tribune Co. for \$510 million, twice the price KKR paid for the station two years before.

The biggest broadcast-related sale of last year, although not yet closed, was General Electric's \$6.3-billion purchase of RCA. NBC, only a slice of RCA, will become an even smaller slice of what will be one of the biggest U.S. corporations with annual sales of over \$40 billion.

Capital Cities Communications Corp. swallowed ABC in a transaction valued at \$3,429,909,422. CapCities became the first entry to

32 years of station transactions

	Dollar volume of transactions approved by FCC				Number of stations changing hands			
	Total	Radio only	Groups	TV	Radio	Groups	TV	
1954	\$ 60,344,130	\$ 10,224,047	\$ 26,213,323	\$ 23,906,760	187	18	27	
1955	73,079,366	27,333,104	22,351,602	23,394,660	242	11	29	
1956	115,605,828	32,563,378	65,212,055	17,830,395	316	24	21	
1957	124,187,660	48,207,470	47,490,884	28,489,206	357	28	38	
1958	127,537,026	49,868,123	60,872,618	16,796,285	407	17	23	
1959	123,496,581	65,544,653	42,724,727	15,227,201	436	15	21	
1960	99,341,910	51,763,285	24,648,400	22,930,225	345	10	21	
1961	128,804,167	55,532,516	42,103,708	31,167,943	252	13	24	
1962	101,742,903	59,912,520	18,822,745	23,007,638	306	8	16	
1963	105,303,078	43,457,584	25,045,726	36,799,769	305	3	16	
1964	205,756,736	52,296,480	67,185,762	86,274,494	430	20	36	
1965	135,123,766	55,933,300	49,756,993	29,433,473	389	15	32	
1966	135,718,316	76,633,762	28,510,500	30,574,054	367	11	31	
1967	172,372,573	59,670,053	32,086,297	80,316,223	316	9	30	
1968	152,455,412	71,310,709	47,556,634	33,588,069	316	9	20	
1969	231,697,570	108,866,538	35,037,000	87,794,032	343	5	32	
1970	174,785,442	86,292,899	1,038,465	87,454,078	258	3	19	
1971	393,547,924	125,501,514	750,000	267,296,410	270	2	27	
1972	271,330,537	114,424,673	0	156,905,864	239	0	37	
1973	230,381,145	160,933,557	2,812,444	66,635,144	352	4	25	
1974	307,781,474	168,998,012	19,800,000	118,983,462	369	5	24	
1975	259,485,961	131,065,860	0	128,420,101	363	0	22	
1976	290,923,477	180,663,320	1,300,000	108,459,657	413	3	32	
1977	289,871,604	161,236,169	0	128,635,435	344	0	25	
1978	651,728,398	331,557,239	30,450,000	289,721,159	586	5	51	
1979	1,116,648,000	335,597,000	463,500,000	317,581,000	546	52	47	
1980	876,084,000	339,634,000	27,000,000	534,150,000	424	3	35	
1981	754,188,067	447,838,067	78,400,000	227,950,000	625	6	24	
1982	998,398,244	470,722,833	0	527,675,411	597	0	30	
1983	2,854,895,356	621,077,876	332,000,000	1,902,701,830	669	10	61	
1984	2,118,056,053	977,024,266	234,500,000	252,025,787	782	2	82	
1985	5,668,261,073	1,414,816,073	962,450,000	\$3,290,995,000	1,558	218	99	
Total	\$19,348,633,777	\$7,542,079,256	\$2,835,319,833	\$9,993,218,764	11,188	NA	982	

Note: The dollar volume figures represent total consideration reported for all transactions with the exception of minority interest transfers in which control of the stations did not change. Hence and stations sold as part of large company transactions, such as CapCities buy of ABC. All sales have been approved by the FCC. Also, prior to 1978, a combined AM-FM facility (now group) was counted as one station in computing the total number of stations involved. Prior to 1977, figures represent total number of deals involving both radio and television. Since 1977, figures represent only television stations. Beginning in 1977, when the FCC's one-to-a-market rule prohibiting the sale of co-located TV and radio stations became effective, figures represent the total number of separately located TV and radio stations that were sold in packages. In 1985, the merger of large groups with interests other than broadcast stations could not be evaluated, since individual station values were not broken out of the larger sales. Group sales totals are now limited to combinations of "pure" station sales—those only concerning TV and radio stations.

buy a major network since United Paramount Theaters, headed by Leonard Goldenson, took over ABC 33 years ago. Some radio properties involved in the transaction remain to be divested to comply with FCC crossownership rules, but CapCities/ABC wound up with eight TV's, making it the largest TV group in the country, with coverage of 24.39% of the U.S. TV market. The \$3.5-billion price tag was softened somewhat by the proceeds from properties already spun off under FCC rules. The sales of CapCities' cable systems, four television stations and seven radio stations totaled \$1,036,500,000, with sales of AM-FM combinations in Los Angeles, Chicago, New York and San Francisco still to come.

Kohlberg Kravis Roberts & Co.'s 11th-hour purchase of Storer Communications for \$2.5 billion ended takeover attempts by Coniston Partners (Committee for the Full Value of Storer) that Storer had been fighting. KKR, which has become the pre-eminent practitioner of the leveraged buyout, scored a hat trick with the purchase of Storer, since it purchased Golden West in 1983 and Wometco in 1984. After the sale of KTLA, KKR/Storer was the seventh largest TV group owner with a 13.73% penetration of the U.S. market. Storer owns seven TV's and cable systems serving 1.5 million subscribers.

The members of the Cox family and the company management that own Cox Enterprises took that company private with a tender offer for the remaining 59.8% of the shares outstanding. With an offer of \$75 per share, the value of the buyout was placed at about \$1.3 billion. Cox owns cable systems serving 1.76 million subscribers, five AM's, seven FM's and seven TV's and is the 10th largest TV group owner with an 8.645% penetration.

Gannett's purchase of the Evening News Association for \$717 million ended the takeover challenge to that company by both L.P. Media, a group headed by producer Norman Lear and Jerrold Perenchio, and McLean, Va.-based businessman and Washington Redskins owner Jack Kent Cooke. Included in the sale were five TV's, two radio stations and nine newspapers, including the *Detroit Free Press*. Gannett spun off three of the ENA TV stations to Knight-Ridder Broadcasting and ENA's Detroit radio stations to a group of

Detroit businessmen. One of the stations acquired, WQVH-TV-Wilmington, which is in the same market as Gannett's headquarters Arlington, Va., where *USA Today* is produced, was determined by the FCC not to violate the crossownership rules since the new group is a national paper. Gannett was given until Oct. 1, 1989, to sell WQVH-AM-FM Detroit, which it already owned, or *The Detroit News*, acquired in the ENA purchase, by the time the stations' licenses expire.

For radio, the news has been equally spectacular. There were 1,558 radio stations sold in 1985, double the 782 stations sold in 1984. Radio-only station sales accounted for \$1,414,316,073. That was almost 69% higher than last year's record of \$977 million. With the increase in the number of stations sold came a decrease in average price per station, \$980,097 in 1985, down from 1984's record of almost \$1.2 million. Last year saw a new record for radio-only group sales. Taft sold five radio stations to CBS for \$107.5 million, topping the sale of the Harte-Hanks radio group for \$76.5 million in 1984. The second biggest radio trade in 1985 was Mair's purchase of three stations from ABC for \$75.5 million.

The record for FM stand-alones fell, again, with the sale of KUOI(FM) Los Angeles for \$44 million. That price also briefly held the record for AM-FM combinations, set earlier when KTNQ(AM)-KLVE(FM) Los Angeles went to H&W Communications for \$40 million. However, CapCities' sale of WPAQ(AM-FM) Paterson, N.J., to Park Communications for \$49 million set the 1985 record.

Television station sales cannot be totaled in value since many stations were sold last year as parts of large properties with no individual prices assigned to the stations. The total value of traceable sales of TV stations was \$3,290 billion in 1985, nearly three times the \$1,252 billion of 1984.

The summary of sales of all stations and groups over \$1 million follows.

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Groups

In a year of mergers, buyouts and unprecedented station trading, it was necessary to create a new category for BROADCASTING's annual "Changing Hands" special report: sales of station groups. (Some of the biggest group transfers cannot be evaluated; they were parts of corporate changes that also included other assets in total purchase prices. Examples were GE's proposed \$6.3-billion takeover of RCA with all of the latter's manufacturing and marketing resources as well as its NBC radio and television networks and stations; CapCities' \$3.5-billion acquisition of ABC and its publishing, video, radio and television operations; the Kohlberg Kravis Roberts takeover of Storer's television stations and many cable systems; the Cox families' taking private Cox Communications and its broadcast, cable and auto auction holdings; and Gannett's purchase of the Evening News Association and newspaper and broadcasting properties).

◻ The largest pure station transaction last year was Metromedia's sale of its seven TV stations to the Australian newspaper publisher, Rupert Murdoch, who became a U.S. citizen. Murdoch, who purchased 20th Century Fox last year with Denver oilman Marvin Davis (who later sold his interest in Fox to Murdoch), bought the Metromedia TV

stations for \$2 billion and spun off one, WCVB-TV Boston, to Hearst for \$450 million. Murdoch was given two years by the FCC to rid himself of newspapers or newly acquired television stations in New York and Chicago where he ran afoul of crossownership rules. Murdoch also bought the Metromedia Producers Corp. syndication and programming arm later in the year for \$40 million. Murdoch becomes the proprietor of the fifth biggest TV station group in terms of total station coverage, reaching 18.295% of total U.S. television homes. John Kluge, who had taken Metromedia private 11 months earlier for \$1.45 billion, was left with Metromedia's radio group, various entertainment enterprises and outdoor advertising properties that were sold last week (see "Bottom Line," this issue). Kluge also sold KHOW-TV Denver for \$11 million, a high for the year in stand-alone AM's.

◻ Also closing last year was Taft's \$760-million purchase of Gulf Broadcasting and its radio and television group. That sale moved Taft into the number-eight spot of TV group broadcasters with an 11.205% penetration of the U.S. Taft later spun off five radio stations to CBS (see below).

◻ Next was the purchase of WXYZ-TV Detroit and WFTS-TV Tampa, Fla., by Scripps Howard for \$246 million. The sale was the largest spin-off from the CapCities/ABC merger, with \$200 million going for the Detroit station and \$46 million for Tampa. The buy made Scripps Howard the 14th largest TV group with 7.515% coverage.

◻ At the end of the year, spin-offs from the ENA-Gannett merger were beginning to show up at the FCC. KOLD-TV Tucson, Ariz. (ch. 13, CBS), KTVY-TV Oklahoma City (ch. 4, NBC) and WALA-TV Mobile, Ala. (ch. 10, NBC) were sold for \$160 million to Knight-Ridder Broadcasting. The sale made K-R the 20th largest TV group with market penetration of 4.67%.

◻ The largest radio-only group sale came when CBS purchased Taft's spin-offs from the latter's purchase of Gulf: WSNW-WYNF-FM St. Petersburg, Fla.; KLTRO-FM Houston; KTAQ-FM Fort Worth, and WLTW-FM Bethesda, Md., were sold for \$107,500,000. The purchase enlarged CBS's radio portfolio to seven AM's and 11 FM's.

◻ WKZO-TV Kalamazoo, Mich. (ch. 3, CBS); KMGH-TV Sioux City, Iowa (ch. 14, CBS), and KOLN-TV Lincoln (ch. 10, CBS) and KGN-TV Grand Island (ch. 10, CBS), both Nebraska, were sold by Fetzer Broadcasting to Gillett Communications Co. for \$80 million.

◻ WHTM-TV Harrisburg, Pa. (ch. 27, ABC), and WFTM-TV Elmira (ch. 18, NBC) and WSTM-TV Syracuse, both New York (ch. 3, NBC), were sold for \$79 million by Times Mirror. WHTM was purchased by Smith Broadcasting Corp. (47.2%), a firm owned by Robert Smith, who also owns WCTI-TV New Bern, N.C. William Reymen, an attorney with the Washington communications law firm of Hogan & Hartson owns 24.8%, and George Lilly, (a former vice president

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Broadcasting Jan. 27, 1988

C KLAC(AM)-KTLA(FM) Los Angeles and KSSR-FM Houston were spun off by ABC to Malrite for \$75.5 million. Malrite had tried

© The Amstar Group divested its radio properties to Keymarket Communications for \$60.1 million. The stations sold were KMOF(M) St. Louis, KMOF(M) Houston and WJLM(M) Detroit. The Amstar Group also sold its television stations for \$10 million to Gordon Broadcasting. Those stations were KMGH-TV Kearney (ch. 13, independent), KSNB-TV Hayes Center (ch. 6, ABC) and KSNB-TV Superior (ch. 4, ABC), all Nebraska. Gordon Broadcasting is owned by Robert Gordon, former president of Western

□ KHON-TV Honolulu (ch. 2, NBC) and satellite KAE-TV Wailuku, (ch. 7, NBC), both Hawaii, were sold for \$47.5 million by the *Des Moines Register* to Burnham Broadcasting, a group headed by Peter Desnoes. Desnoes is a former vice president of ABC-owned TV stations and general manager of WLS-TV Chicago.

□ Price Broadcasting capped off a year of buying with the purchase of WEEK-TV Peoria, Ill., and WCRG-TV Columbia-Jefferson City, Mo., from Kansas City Southern Industries for \$30 million. Price spent a total of \$100 million on station acquisitions last year.

□ Jeff Smulyan gained control of Emmis Broadcasting, which owns WENS(AM) Shelbyville, Ind.; WLOL(FM) Minneapolis; KMGF(FM) Los Angeles, and KSHE(FM) Crestwood, Mo., for \$20 million.

• KTPX(TV) Odessa (ch. 9, NBC) and KWAB(TV) Big Spring (ch. 4, NBC), both Texas, were sold for \$16.5 million by John Tupper and Richard Shively to a group headed by Francis Martin, chief operating officer of Chronicle Broadcasting, San Francisco.

of Chronicle Broadcasting, San Francisco.

□ Dakotaland Broadcasting Co., owned by Sherwood Corner and Gilbert Moyle, sold KDLT-TV Mitchell (ch. 5, NBC), KEVN-TV Rapid City (ch. 7, NBC) and KVVU-TV Lead (ch. 5, NBC), all South Dakota, to publicly traded Heritage Broadcasting Group, for \$15.5 million.

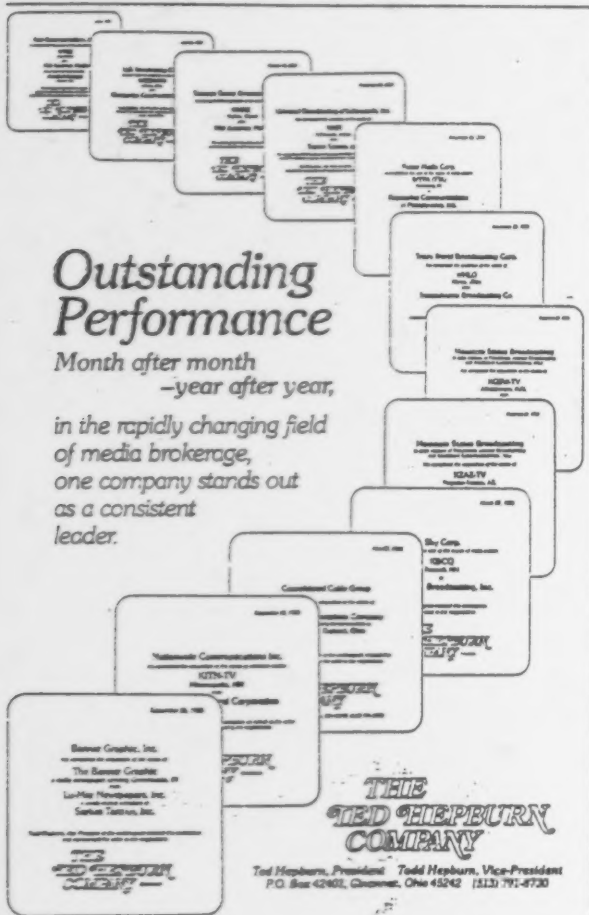
□ KENZ(AM)-KSAC(FM) Sacramento and KSJO(FM) Manteca, both California, were sold for \$12 million by Jonsson Communications Corp., which owns two AM's and three FM's and publishes *Sacramento* magazine, and is owned by Ken Jonsson and family, to a group, headed by Dex Allen, which owns KMN(AM)-KGGI(FM) San Bernardino, Calif.

□ KSFY(TV) Sioux Falls (ch. 13, ABC), KABY(TV) Aberdeen (ch. 9, ABC) and KPIY(TV) Pierre (ch. 4, ABC), all South Dakota, want for \$10 million from Forum Publishing Co. to David Bradley and family, publisher of the St. Joseph (Mo.) *News-Press and Gazette*. The buyers also own three TV's and four Missouri cable systems.

• WJOK-AM-FM La Crosse, Wis.; KJOC-AM-FM Grand Forks, N.D.; and KKYC(AM)-KJRC(FM) Sioux Falls, S.D., were sold for \$8 million to Vaughn's Inc., a Minneapolis-

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based manufacturer owned by David Willets. The seller was Tom Ingstad, who also bought KMDM(AM)-KGGG(FM) Rapid City, S.D.

□ WYKY(FM) Lebanon and WSEV(AM)-WYUU(FM) Sevierville, both Tennessee, were sold for \$7.5 million by Sun Group Broadcasting to Republic Broadcasting Corp., whose principals are Robert Castellini, William Dewitt, Mercer Reynolds and Randy Michaels who also own WLW(AM) Cincinnati and WSKS(FM) Hamilton, Ohio. Sun Group, a publicly traded company, majority owned by George Mooney, later bought KEAN-AM-FM Longview, and KYKY-FM Abilene, both Texas, for \$8,250,000 from John D. Osborne and Rusty Reynolds.

□ Former NBC vice president, Richard Penn, and his brother, Morgan, a New York stockbroker, bought KQEO(AM)-KZZX(FM) Albuquerque, N.M., and KVOR(AM)-KSPZ-FM Colorado Springs for \$5.4 million from Sunbelt Communications, principally owned by C.T. Robinson and William Moyes.

□ Frederick Gregg, owner of a Lakeland, Fla.-based cable operator, Quest Communications, bought KDM(AM)-KZZL(FM) Sherman, KZEY(AM)-KROZ(FM) Tyler and KNET(AM)-KYYY(FM) Palestine, all Texas, for \$4,750,000 from Thomas Gibson and family.

□ Charles Woods bought KIAS(FM) Amarillo, KFLX(FM) Laredo and KPAS(FM) Fabens, all Texas, and WAVE(AM) Birmingham and WACV(FM) Montgomery, both Alabama, for \$2,950,000 from Good News Broadcasting and also bought KMTCTV Springfield, Mo., from Kenneth Meyer.

□ WSMY(AM) Weldon and WPTM-FM Roanoke Rapids, both North Carolina, and WGA-PLAM Valdosta and WTOQ-FM Cairo, both Georgia, were sold for \$2,650,000 by Allen Woodall and Tim Moran to Ronald J. Verlander and Allen Woodall's brother, William. The buyers own a group of four AM's and four FM's.

□ Compass Communications, a new corporation owned by Don Curran and Herb Victor, former president and vice president, respectively, of Field Stations, bought an interest in the Peoria (Ill.) Star Journal's KSSZ(AM) Colorado Springs, KVUU(FM) Pueblo, Colo., and KRPM(AM) Salina and KICT(FM) Wichita, both Kansas, for \$1 million with an acquisition plan in which Curran and Victor gain ownership of the stations in three increments, up to 50%, depending on the profits made.



Broadcasting's high water mark for a single station price was set last year when Tribune Broadcasting purchased KTLA(TV) Los Angeles (ch. 5, independent) for \$510 million in May from Kohlberg Kravis Roberts, which had bought the station from Gene Autry in October 1984 for a then-record \$245 million. The purchase made Tribune the fourth largest TV station group by market penetration (with 18.6%), the largest after the networks.

This points out, however, the difficulty in talking about record prices last year. With the emergence of station group/network sales, prices of many individual stations are difficult to estimate. For example, some industry observers put the value of Metromedia's WNEW-TV New York (ch. 5, independent), at about \$560 million, which would make it the largest single sale if broken out of the purchase by Rupert Murdoch of six of Metromedia's seven stations. A new column has been added to the transaction chart on page 92 to track these sales.

□ The previous single-station record had been set only a week earlier with Hearst's purchase of WCVB-TV Boston (ch. 5, ABC) for \$450 million when the station was spun

out of the Rupert Murdoch purchase of Metromedia's stations. Hearst was the 16th largest station group after the purchase. In November, Group W announced it had purchased KHU-TV Los Angeles (ch. 9, independent) from RKO General Inc. for \$313 million and was bidding for RKO's WOR-TV Secaucus, N.J. (New York). The \$200-million difference between KHU-TV and KTLA shows what being number six in a six-VHF market means.

KHU-TV had been the subject of a comparative hearing before the FCC. Almost \$95 million of the purchase price was set aside to buy out Fidelity Television, which had been challenging RKO for the KHU-TV license for nearly 20 years. The deal moved Group W

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1985 STATION SALES: A RECORD HARD TO BEAT

The old radio comedy program, *Can You Top This?* would be a fitting question to follow the most incredible year in radio-TV station sales.

As the table below shows, the estimated dollar value of station sale announcements in 1985 was nearly triple the previous peak in 1983 and more than 10x the "mere" \$1.2 billion just four years before.

Only AM standalones--now the "new" frontier for broadcast entrepreneurs--resembled earlier performance. Note that the average TV and AM-FM combo sold for double the price of two years before:

(millions of dollars)	1981	1982	1983	1984	1985	5-Yr. Change	Avg. Annual Change
Proposed TV station sales	\$ 654	\$ 967	\$4054	\$2053	\$12280	+1766%	+108%
Proposed AM/FM combo sales	205	276	431	688	1427	+ 597	+ 63
Proposed FM station sales	208	164	426	283	905	+ 335	+ 44
Proposed AM station sales	164	119	207	242	233	+ 42	+ 9
Total proposed station sales	\$1239	\$1525	\$5117	\$3267	\$14845	+1102%	+ 84%
Total TV proposed sales	32	53	127	112	159	+ 491%	+ 56%
Total AM/FM proposed sales	147	159	208	302	134	+ 127	+ 23
Total FM proposed sales	118	135	207	193	280	+ 137	+ 24
Total AM proposed sales	278	248	333	392	350	- 26	+ 6
Total \$ proposed station sales	575	595	675	1000	1193	+1005%	+ 15%
Avg. price of a TV station	\$20.56	\$18.24	\$31.92	\$18.33	\$64.97		
Avg. price of an AM-FM combo	1.39	1.73	2.07	2.28	4.27		
Avg. price of an FM station	1.76	1.21	2.06	1.47	3.23		
Avg. price of an AM station	.59	.48	.62	.62	.66		

Note: "Proposed station sales" are those announced in 1985, even if not approved by the FCC during the year. They include estimated allocations for stations that are part of diversified companies and major partial purchases, such as the Cox Comm. stock tender.

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EVENING NEWS POSTSCRIPT: THE VALUE WAS THERE

It didn't take long to prove that our valuation of Evening News Assn. stations and stock price was on the money. Five of the company's seven stations have already been sold for more than we thought they were worth.

We pegged the value of TV stations in Okla. City, Tucson & Mobile at \$155.4 mil. (BI 8/30/85) and the trio was sold to Knight-Ridder for \$160 mil. We had the Detroit radio stations at \$33.6 mil. and they were sold for \$39 mil.

(Note: If the TVs could so quickly be sold for such a retail price to the company ENA competes with in the Detroit newspaper business, why were people underestimating the overall value of the company?)

If we were close on the stations sold thus far, it's reasonable to believe we were close on the remaining TVs in Washington & Austin: \$386 mil.

Add that to the \$400 mil. we think ENA's newspapers are worth and its \$40 mil. in balance sheet cash and you get \$1.025 bil., or \$2,263/share. Gannett paid only \$1,583.

We know management was pressured to sell by the Lear-Perenchio tender offer and a roster of dissatisfied stockholders. That was the reason for the price, not the inherent value of the assets themselves.

UPCOMING KAGAN SEMINARS: Mark your calendar now for Paul Kagan's broadcast seminars. His TV STATION VALUES and RADIO STATION VALUES seminars will be held May 7 and 8 at the Park Lane in New York City. Other seminar topics this spring include Motion Picture Finance, TV Program Syndication, The FCC Future and The Pay-Per-View Future. For more information or to register for the broadcast seminars, call Genni O'Connor at (408) 624-1536.

[New York Times, Feb. 19, 1986]

MCA to Buy WOR-TV For a Hefty \$387 Million

By GERALDINE FABRIKANT

MCA Inc. yesterday announced an agreement to acquire WOR-TV from Gencorp Inc. for \$387 million, a price that analysts said reflected an unusually high premium over its established earning power.

WOR-TV, Channel 9, which covers the New York market from its base in Secaucus, N.J., last year had cash flow of about \$15 million, and it expects cash flow of about \$19 million this year. The acquisition price thus is roughly 20 times this year's cash flow; most stations have been selling for just 10 to 17 times cash flow. For television stations, cash flow is defined as pretax income plus interest, depreciation and amortization.

Part of the reason for the premium price for WOR is the perception that the station's profitability can be significantly improved. According to sources familiar with the station, it had revenues last year of about \$30 million, giving it a profit margin of roughly 20 percent last year. Well-run independent stations can post profit margins of as high as 40 percent.

Sidney J. Sheinberg, president of MCA, the parent of Universal Pictures and Universal Television, defended the high price. "WOR-TV is the only VHF television station in the New Jersey-New York market that has been available for acquisition on a stand-alone basis in recent memory," he said.

Moreover, WOR-TV is one of the nation's four superstations, which are carried by satellite to cable households outside their local markets.

An Outlet for Programming

Mr. Sheinberg also pointed out that a number of the other stations in the New York market are owned by companies that intend to produce original programming. "That could have shut us out of the market," Mr. Sheinberg said. But now, he said, MCA's television division, which produces and syndicates a number of television series, will have an outlet in the New York market. For television compa-

nies that sell the rerun rights to network series, New York is one of the most important and profitable markets in the country.

The agreement between Gencorp, formerly known as the General Tire and Rubber Company, and MCA includes a provision that allows MCA to enter into a partnership with another company. Cox Communications Inc. had planned to act as a partner with MCA in the acquisition of WOR-TV. However, Cox pulled out during last-minute negotiations on Saturday.

Even though MCA went ahead on its own, it may still look for a partner. The purchase was the largest diversification yet for the company. In a much smaller deal, it recently purchased a one-third interest in the Cineplex Odeon Corporation, a Canadian-based theater chain.

Gencorp, which had put the station on the market as part of a restructuring program, was represented by Kidder, Peabody & Company. Peter Goodson, head of the firm's mergers and acquisition department, said that he had thought all along that a company that owned programming would be the ideal bidder. Lazard Frères & Company represented MCA.

The other leading bidder was the Westinghouse Electric Corporation, which recently sold its cable operations and has since been buying television stations. It recently bought KHJ-TV, the Gencorp station in Los Angeles, for \$310 million.

WOR-TV is part of the RKO General Inc. division of Gencorp and was one of three RKO stations whose licenses were revoked in 1980 by the Federal Communications Commission for what it said was corporate misconduct. Eventually, however, WOR agreed to move to Secaucus, from New York, and it was allowed to keep its license.

WOR broadcasts the games of a number of New York professional teams, and it has a contract to carry the baseball games of the Mets this season. Mr. Sheinberg said the decision on whether to renew the contract would be made at the end of the year.

2/27/86

Sell the Airwaves and This Time Pay the Owner

By SANFORD PENSLER

In the past year, private investors made close to \$10 billion selling broadcasting rights owned by the U.S. government. The Treasury received nothing.

Examples of this trend abound, including the sale of stations by Storer Communications Inc. and Metromedia Inc., as well as the purchase of broadcasting units owned by ABC and now NBC as part of the acquisition of the parent companies.

The Federal Communications Commission has allowed broadcasting licenses to be treated as if they were the property of broadcasters—which they are not. U.S. taxpayers are the lawful owners of these frequencies, and it is they who should most profit from their sale.

The current abuses are performed under the flag of deregulation, but they originate with an antiquated regulatory mechanism and its ineffective application. The Federal Communications Act of 1934 declared that the government owns the airwaves. The point of plenary ownership was to avoid the chaos of interfering transmissions and to foster rapid and efficient use of broadcast media.

The FCC was authorized to license the airwaves for periods of three years. After that time, stations must apply for a renewal. All wishing to obtain one of those licenses have the legal right to a hearing, to demonstrate that they could serve the public interest better than the current licensee. The license is to be granted to whichever enterprise demonstrates its ability to best serve the "public interest."

In reality, of course, the right to a competitive hearing is illusory. No television station has lost its license since 1969. The FCC has, as federal circuit Judge Stephen Breyer put it, adopted a policy of assured renewal. This allows private investors to sell these stations and receive the long-term capitalized value of the monopoly-based cash flows generated by continued

use of the license. In effect, when they sell the station they sell the license as if it were their property.

TV stations are being transferred in major markets for astronomical multiples of their book values, and premiums of \$200 million-plus per station over the net cost of assets are not uncommon. KTLA in Los Angeles, for example, was sold for \$510 million, even though its book value was only \$30 million. The \$387 million sale of the New York area's WOR, with a presumably low but not yet disclosed book value, was announced this month.

There can be little doubt here that what was sold was the continuing value of the license. After all, what is a station? Little more than a transmitter and antenna.

What's needed is a moratorium on license transfers associated with station sales, followed by an auction process whereby all broadcasting frequencies are sold as current licenses expire. The present holders would receive only the book value of the stations. Recent purchasers at high multiples would be protected under such a plan because the premium they paid over book value would be included in the new book value of these stations. The

windfall profits already obtained by previous licensees from the sale of stations, however, would be lost to the government.

Holders of existing licenses are likely to object that to change the de facto rules that govern them, denying future windfalls, is unfair. The answer to this is that the law has consistently stated they could not obtain ownership rights to the airwaves. The risk that the law would be enforced was a business calculation they made when they purchased or retained the station.

In legitimating privatization of the airwaves, we should nevertheless ensure continued protection of the public interest in broadcasting by minimal continuing regulation and requirements for the stations. This could be in a form much like zoning requirements for real property.

The system currently in place may have been appropriate during the 1940s and 1950s, when commercial television was just taking hold. Short-term monopoly profits could be overlooked if they sped the development of an infant industry that had high development risks and potentially fantastic public benefits. Besides, the profits were supposed to be short-term. The stations had tedious public-service requirements, and the government still owned the airwaves.

Long ago, however, broadcasting ceased to be an infant industry, and it no longer has inherent growth risks. It even seems to have shaken loose the tedious public-service requirements. It is time we recognize the reality of the situation and act accordingly.

The U.S. government, mired in debt and struggling to narrow its deficits, should receive the premiums from the sales of its airwaves.

Mr. Pensler is a banker and lawyer involved in mergers and acquisitions.

BMI SUPPLEMENTAL STATEMENT

In accord with the Chairman's decision to keep the hearing records open to receive additional material, we wish now to add the following supplementary material to our testimony:

The proponents of S. 1980 made several allegations of "fact" to support their contention that S. 1980 is necessary to correct certain inequities in the present licensing system - inequities so severe that only drastic legislation, not negotiation, can cure them. In the simplest terms, however, all of these "factual" allegations are wrong!

Most of them were analyzed - and rejected - by the Federal Appeals Court in their review of the Buffalo case. The S. 1980 proponents have consistently chosen to reject this decision, and refer, instead, only to parts of the trial court record or trial court decision - a lower court decision that was unanimously reversed. The committee needs only review the standing decision to determine which version of fact is correct.

For purposes of this supplementary material, however, we propose to examine one "fact" which may not have been fully examined by the court. Proponents of S. 1980 have consistently claimed that BMI and ASCAP have them in an unfair bargaining position. During the Senate hearings, Congressman Boucher, who introduced the bill into the House, testified that, in reference to the license form, that "It is not really negotiated. ASCAP and BMI decide what they are going to charge and they essentially say to the local TV stations, you can take this or leave it!" (Emphasis added.)

Obviously, the Congressman's statement was based on information given to him by the broadcasters, but that information was false! As Edward M. Cramer (President, BMI) told the subcommittee, he was personally involved in at least four sets of negotiations with the television broadcasters during his nearly 20-year tenure.

Without going into the details of all of these negotiations, we feel it important that material regarding at least two be made a part of the record. The most recent began in the spring of 1985, after the Court of Appeals reversed the lower court decision in the Buffalo case. For some time prior to that, the committee had shown no interest in negotiating - only in litigating. Since the situation had now changed, BMI once again began attempts to negotiate a new license with the All-Industry TV Music License Committee. BMI met only with rebuff. Its offer to submit any difference to binding arbitration was also rejected.

Clearly these facts do not support the allegation that BMI expressed only a "take-it-or-leave-it" attitude. However, on June 14, 1985, faced with the Committee's refusal to negotiate, BMI had no choice but to act unilaterally and send a new license form out to all television stations. The necessity had previously been explained to broadcasters via full page ads taken in the various trade publications and via a letter which accompanied the new license forms. (Copy of the letter and advertisement attached as Supplementary Exhibit 1A and 1B.)

Almost no agreements were signed and returned to BMI. Instead, in what was clearly an illegal act, the stations continued - almost en masse - to continue their massive infringement policy and refusal to deal. BMI opted not to sue, but to try - once again - to negotiate. This last attempt was successful and an agreement was negotiated.

In a letter sent jointly to all TV broadcasters by Broadcast Music, Inc. and the All-Industry Television Music Station License Committee on October 4, 1985 (attached as Supplementary Exhibit 2), the TV committee said the following:

"We are pleased to enclose copies of the new form of BMI-local television station blanket license agreement which is the result of many months of negotiations between BMI and the All-Industry Television Station Music

License Committee.....We think it is a good agreement and therefore strongly endorse it and urge that you execute and return it to BMI promptly."
(Emphasis added)

Among the various things which resulted from this negotiations round were the following:

- a. BMI agreed to withdraw its prior contract.
- b. BMI reduced the previously submitted rate.
- c. BMI agreed to seek modification of its Consent Decree to provide for a Rate Court procedure instead of the previously proposed (by BMI) commercial arbitration.
- d. BMI agreed to a major, financial concession and gave stations an eight month grace period in which to pay back fees. (The court had previously ordered that these be paid to BMI "promptly".)

The documented facts simply do not support the proponents repeated contention that they were offered nothing more than "take it or leave it". As an incidental matter, it should also be pointed out that, as of January 31, 1986, less than half of the stations have honored their agreement and paid their back fees. We now find ourselves forced to begin court proceedings against those stations that are delinquent.

Equally significant to the most recent negotiations are the ones which took place in 1969 and 1970. Here again, it was the television stations who elected not to negotiate a new form of contract with BMI. In this instance, they claimed that they were so pleased with the newly negotiated ASCAP license form that they insisted it be used by BMI. This meant eliminating the "carve-out" provision which had been in the BMI contract for 22 years prior and which had given stations the right to deduct - from the amount on which they base their payments - revenues from programs licensed by them directly.

For broadcasters to now cry that S. 1980 is "essential" because, as their basic argument continually claims, they are "powerless" to negotiate with us, is - if nothing else - a blatant distortion of fact!

The proponents have also repeatedly claimed that S. 1980 will benefit writers, but, again, the facts do not bear that out. In his testimony before the subcommittee, Edward M. Cramer, President of BMI, said he knew of not one out of the tens of thousands of writers with works licensed through BMI who supported this bill.

But let us look to the proponents themselves. Since the burden of proof remains with them, how many writer-advocates have they found?

In a February 12, 1986 letter sent to all television stations by the All-Industry Television Music License Committee, they said "And, should you be able to find someone among your local composers who understands this (bill) and would be supportive, please let us have that person's name just as soon as possible. Finding these people is critical to the success of our efforts."

To date, and in spite of a concerted, nationwide effort, they have not been able to produce even 1% of the active writers to say they support the proponent's position. This, of course, is hardly surprising in light of the open disdain with which the proponents have consistently viewed the music involved. "Mediocre" is the word they have used and, in testimony before both chambers, have attempted to ridicule the music.

Fortunately, for the public interest, these views are in the minority. Of popular music, in general, the great journalist and national commentator, Carl Rowan, once wrote -

"Ask me how I'd prefer to judge a society. By its preachers and politicians, its authors or architects? No, I'd first look at the output of those who write it's popular songs."

"In war or peace, hard times or good, it is the popular song writers who tell us much about the heart and soul of a nation."

More recently, and on the specific subject of television music, that same view was echoed by Newsweek Magazine. In an article (3/17/86) describing a recently released collection of recorded TV themes the following was said:

"Each theme song is a time capsule that tells you what the world was like when the show was made."

There are two other documents which we feel are particularly relevant at this point. And, so that the record can be complete, we would like to add following two exhibits:

1. Supplemental Exhibit 3

A TV Guide Commentary ("Song Writers Hear A Sour Note From TV") authored by former Ambassador Walter H. Annenberg who, for many years, was a distinguished broadcaster. (TV Guide 12/28/85)

2. Supplemental Exhibit 4

A two-part article written by the distinguished attorney Alvin Deutsch, Counsel for the Songwriters Guild - one of the oldest and most prestigious organizations of its kind in this country. (New York Law Journal 3/7/86 & 3/14/86)

But, after all of the testimony and exhibits have been reviewed, the question may still remain - is S. 1980 really in the best interests of composers? In our view, the proponents' inability to produce any significant measure of support from within the creative community is answer enough.

SUPPLEMENTARY EXHIBIT "1A"



Broadcast Music, Inc. 320 West 57th Street, New York, N.Y. 10019 212 585 2000
Cable Address: Broca: mus NY

EDWARD M. CRAMER
PRESIDENT

June 14, 1985

Dear TV Broadcaster:

As you probably know, your current music license agreement with BMI expired some time ago. For the past many months we have been extending it - voluntarily and on an interim basis - in hopes that a new agreement could be negotiated with the music licensing committee. The extensions end on June 30th. After that time, as you already know from our letter of May 24th, you will no longer be licensed by BMI and - unless you've made other arrangements - may find a substantial amount of music unavailable to you.

Most of you, I am sure, know the outcome of our various attempts to negotiate with the committee and the rebuffs with which we were met. For those few of you who may not be familiar with the background and did not see the explanatory ad which ran in many of last week's trade publications - I enclose a copy of it.

Enclosed, also, are two new forms of BMI license - a blanket and per program. Each does reflect certain rate changes, but changes which we feel are quite modest in view of the growth in the BMI repertoire that has occurred during the 15 years since the last contract was negotiated.

Far more significant, however, are the various new concepts which are embodied within these new license forms. In all instances they were designed to simplify and greatly reduce the amount of record keeping and administrative effort you have had to devote in the past. A great deal of time and effort has gone into their development and we think you will be pleased with the result.

As an example, the enclosed blanket license no longer requires you to file monthly reports and offers a new option that greatly reduces your record keeping and computation chores. Similarly, the reporting requirements of the per program form have also been simplified to assist your administrators.

Please review both license forms carefully to determine which best suits your needs. Since your current agreement does expire at the end of this month it is important that you sign and return to us one of the two enclosed license form types as soon as possible.

BMI has repeatedly offered to continue negotiations with the Committee or other interested representatives of the stations. If any such negotiations occur and result in any different terms, you will, of course, be offered those terms. BUT TO INSURE THAT THE BMI REPERTOIRE REMAINS AVAILABLE TO YOU AFTER JUNE 30TH, WE URGE YOU TO SIGN AND RETURN YOUR LICENSE AGREEMENT PROMPTLY.

If you have any questions regarding these new license forms please let us know so that we can assist you. We value our long time relationship with you and look forward to continuing it in the future.

Sincerely,

Edward M. Cramer
Edward M. Cramer

Encls.

Wednesday, June 12, 1985

PAGE 1

BROADCASTING - JUNE 10, 1985

SUPPLEMENTARY EXHIBIT "1B"

A few words about your TV music licenses:

We Tried!

In 1978 the TV Music Licensing Committee decided to sue BMI for alleged antitrust violations. Six incredibly expensive years later, the Buffalo Broadcasting case finally came to an end in BMI's favor. That was in November of 1984 when the U.S. Supreme Court refused to hear the committee's request for a further review.

Since that time, BMI has bent over backwards to avoid seeming arbitrary about a new license agreement. Month after month, in spite of it placing us at a disadvantage, we voluntarily extended our old agreement with you—on an interim basis—in hopes that the committee would find time to sit down with us and work out a new blanket license arrangement.

We repeatedly reminded the committee—both orally and in writing—that this temporary arrangement was coming to an end. Our reminders had no effect. We even offered the committee an interim licensing arrangement and, in writing, *offered to have the final fee set by a panel of impartial arbitrators*. Again, we found no one willing to consider the proposal.

In simple fact, only within the past few weeks has the committee even begun to talk about a new blanket agreement. And then, unfortunately, the talks were fruitless.

As said at the outset, we tried! We gave it our best, but it must be clear to you that we could not continue to voluntarily extend this lop-sided licensing arrangement. It worked to no one's advantage—neither our BMI affiliates nor, in the long run, to yours. At the same time, though, we didn't want to leave you in a hole. Your audiences enjoy a great deal of BMI-licensed music and we believe that you will want to continue to have it available for them.

Under the circumstances, BMI was left with only one practical option—to come directly to each of you. Within the next several weeks, we will be mailing all of you new license forms. We think you'll find them fair, equitable and easy to administer. We hope you'll choose to remain BMI licensees.



Wherever there's music, there's BMI.

SUPPLEMENTARY EXHIBIT "2"

Joint Letter From
BROADCAST MUSIC, INC.

AND

ALL-INDUSTRY TELEVISION STATION MUSIC LICENSE COMMITTEE

October 4, 1985

Dear Television Broadcaster:

We are pleased to enclose copies of the new form of BMI-local television station blanket license agreement which is the result of many months of negotiations between BMI and the All-Industry Television Station Music License Committee. The new license replaces the blanket license agreement sent by BMI to your station in June, 1985. We think it is a good agreement and therefore strongly endorse it and urge that you execute and return it to BMI promptly.

Following are some of the key provisions of this new agreement:

1. Term: The agreement covers a nearly five-year period, extending retroactively to February 1, 1983 and prospectively through December 31, 1987.
2. License Fees: BMI license fees are calculated as a percent of those to be paid by your station to ASCAP over the term of the license. These percentages escalate slightly over the life of the contract. At present, your station's payments to ASCAP are the subject of continuing federal court rate proceedings and are therefore "interim," subject to retroactive adjustment upon the conclusion of the rate proceedings (or a negotiated settlement, if one is reached). In recognition of this fact, the percent-of-ASCAP payments which your station is to pay BMI under the new blanket license likewise will be of an "interim" nature until a final resolution of your station's ASCAP fees is reached, and an appropriate retroactive adjustment may be called for. You will note that, in the event your station continues to make interim payments to ASCAP during 1986 and/or 1987, the new BMI license requires different "interim" and "final" "percent-of-ASCAP" payments applicable to those periods.

Set forth below is the fee table reflecting the appropriate "percent-of-ASCAP" payments which will be due under the new agreement; please keep in mind that all payments to be made at this point in time are "interim" and will remain so until you receive formal notice otherwise.

FEE TABLE

<u>Time Period</u>	<u>Interim Fee Percent</u>	<u>Final Fee Percent</u>
2/1/83 - 12/31/83	58%	58%
1/1/84 - 12/31/84	58%	58%
1/1/85 - 12/31/85	61.5%	61.5%
1/1/86 - 12/31/86	65%	68%
1/1/87 - 12/31/87	68%	70%

3. Retroactive Interim Fee and Adjustments. As you have previously been advised, as the result of a court order, your station must make an "interim" payment to BMI, again subject to retroactive adjustment once a final ASCAP fee for that period is determined, representing the difference between the amounts your station paid BMI during the February 1983 - November 1984 period (while rates were fixed at 1980 payment levels) and the amounts which would have been due for that period under the pre-existing Shenandoah license formula. Although the court ruled that this "interim" payment was to be made "promptly," BMI has agreed, and the enclosed agreement provides, that such payments need not be made before January 31, 1986 (unless similar fees for this same period are ordered to be paid to ASCAP and become due earlier for ASCAP). BMI is requesting that you provide it with copies of your 1983 and 1984 annual ASCAP reports together with the BMI Statement of License Fee reports for those two periods to enable BMI to compute the amount of this interim payment, and we ask you to cooperate with BMI in providing that data promptly.

For those few broadcasters who have used the alternate payment formula under the Shenandoah license, please note that effective February 1, 1983, the 1.09% optional alternate rate in calculating BMI fees no longer applies.

BMI is also requesting that you provide it with copies of your ASCAP reports for December, 1984 and for the three month period from January, 1985 through March, 1985. Those copies should also be accompanied by the BMI Statement of License Fee report for those periods, calculating the January - March 1985 interim payment at the 61.5% rate.

The November, 1985 bill from BMI will reflect the rate of 61.5% of the 1980 ASCAP fee and provide for the applicable adjustments for the period April 1, 1985 to date. Adjustments for the periods February 1983 through November 1984 and December 1984 through March 1985 will be calculated and billed separately at a later date.

4. A New BMI Rate Court. BMI has agreed promptly to seek a change in its Government Consent Decree so that, in the event of future license disputes, stations will be entitled to a license from BMI upon written request and will be able to apply to a Federal Court for the determination of reasonable license terms. (These procedures would be similar to those governing ASCAP's licensing activities.)
5. Per Program License. The new agreement in essence offers your station the benefit of any per program license terms which may be established as to ASCAP as a result of the ongoing court proceedings or otherwise.

We recommend that you review the enclosures carefully before signing and returning BOTH copies to BMI. (A return envelope has been enclosed for your convenience.) As soon as the agreement has been received and processed by BMI, a fully executed copy will be sent to you.

If you have any questions regarding the agreement please feel free to call Jack Zwaska, the Administrative Director of the Committee, at 212-308-9040, or the BMI Licensing Department in New York at 212-586-2000.

We look forward to a good relationship between the local television industry and BMI in the future.

Leslie G. Arries,
Chairman, All-Industry Television
Station Music License Committee

Edward M. Cramer
President, Broadcast Music, Inc.

Songwriters Hear a Sour Note from TV

By Walter H. Annenberg

The men and women who write the music that moves and inspires us, bringing so much joy to our lives, deserve our attention and respect. That is why we deplore current efforts to deny these gifted people the fruits of their labor.

Broadcasters seem determined to end the present agreements that cover the way they pay for the music that is an essential element in all television programs. The courts have ruled these agreements are enforceable despite the fact that broadcasters have tied and failed, in repeated lengthy and expensive court procedures, to change the method and amount of payment. Now they have turned to Congress. A bill they have caused to be introduced would upset the carefully negotiated system of payments for music rights that has been working smoothly for the past 40 years. This bill, which bears the names of Rep. Frederick C. Boucher (D-Va.) and Rep. Henry J. Hyde (R-Ill.), could reduce payments to songwriters for use of their music on television to a pittance. And if past experience is any criterion, we can now expect the full force of the powerful broadcasting lobby to be brought to bear on members of Congress to persuade them to pass the

bill and help the television stations at the expense of songwriters and program producers.

The present arrangement provides for a "blanket" performance-licensing fee to be paid by each station for access to virtually all copyrighted music. This music performance fee amounts to something less than one percent of a station's gross revenue. Aside from the stations, producers of programs pay a one-time "synchronization" fee for recording the music, and the three commercial networks pay a blanket yearly fee that is negotiated. These blanket fees are turned over to the performance-rights organizations that represent nearly all songwriters and publishers. ASCAP (American Society of Composers, Authors and Publishers) and BMI (Broadcast Music Inc.) The organizations also collect all performance royalties for American music played throughout the world and distribute the money to songwriters and their publishers according to the number of times their music was performed.

Stations that do not wish to pay blanket license fees have a number of alternatives available to them:

1. A station can obtain "per program" licenses from ASCAP or BMI, paying a mu-

sic royalty for each individual broadcast. 2. The agreements ASCAP and BMI have with their members are nonexclusive, leaving stations free to negotiate license fees directly with the composers and publishers instead of with their performance-rights organizations.

3. Since some songwriters do not belong to ASCAP or BMI, the stations can buy rights directly from these composers. 4. Broadcasters can require producers of the programs they broadcast to pay the performance-rights fees, thereby relieving stations of that responsibility. The Boucher-Hyde bill makes this mandatory for their syndicated programs.

While stations obviously would prefer having producers assume performance-rights fee payments, the producers have so far rejected that option and the stations have paid the blanket fee. This is certainly the most cost-efficient and easily administered system, and it permits the stations to broadcast just about any music they choose without keeping records.

It has proved to be a fair and inexpensive way to compensate the artists who write the music that is so vital to television and adds so much to its audience appeal. The courts have ruled that the blanket license is legal. The amount of the blanket fee, incidentally, has been negotiated downward from 2.5 per cent of a station's revenue in 1949 to the present less than one per cent.

Under the Boucher-Hyde bill the stations would not be required to pay the performance-licensing fees for the music in the syndicated programs and commercials they buy and that payment would have to be assumed by the producers of programs. As for the background music in their news shows and local originations, the stations would negotiate with the composers and publishers to arrive at a license fee. Certainly administering such a system would be a nightmare. It also would be unfair to producers of syndicated shows, who are among the biggest risk-takers in the television business and can hardly stand the additional burden of

paying for performance rights on programs that might or might not succeed. They feel they should continue paying their relatively small one-time "synchronization" fees because they are not "performing" the music, merely "recording" it. What the stations were unable to win from Congress with a bill that could be dissolved via the courts, they now seek to win from Congress with a bill that could be dissolved via the courts.

In the opinion of Hal David, president of ASCAP (and, ironically, the lyricist who wrote "What the World Needs Now Is Love, Sweet Love"): "Passage of the bill would end a basic right that authors and composers have always had—the right to have continuous payment for continuous use of our music. The producers would simply buy the music on a one-time basis." Adds David: "That would be like buying a new car, filling it with gasoline and never having to buy gas again."

Last year ASCAP distributed some \$169 million and BMI about \$115 million to their songwriters and composers. According to ASCAP, the royalties under the proposed legislation would be negligible. Actually, they could be negligible, since the producers now pay their one-time recording fee before the true value of the music is established. The producers of M*A*S*H, for example, paid the standard one-time recording fee for the M*A*S*H soundtrack when the show went into syndication, but the required one-time fee had been paid. If the stations had not been responsible for the performance-rights fees—and under the Boucher-Hyde bill they would not have been—the songwriters would have been denied the increased royalties enjoyed by nearly everyone else connected with the show.

It is evident that the proposed unregulated and unfair legislation would harm those who write the music heard on television and the producers who invest in production in the hope that they will succeed. It would be unconscionable for the Congress to go along with this attempt to strip the talents of some of the most creative members of our society.

New York Magazine/Editor

TV GUIDE/A-1

A-2 TV GUIDE

New York Magazine/Editor

NEW YORK LAW JOURNAL—Friday, March 7, 1986

ENTERTAINMENT SECTION

The Buffalo Shuffle: Would This Latest Twist Deny Songwriters Payment for Performance?

By Alvin Deutsch

This is the first of a two-part article. The second part will run next Friday, March 14.

On Sept. 18, 1984 United States Court for Appeals of the Second Circuit rendered a landmark decision in *Buffalo Broadcasting Co., Inc. v. American Society of Composers, Authors and Publishers*. The Court held that the "blanket license" issued by ASCAP and BMI to local television stations was not an unreasonable restraint of trade where the opportunity to acquire rights to music and lyrics through other sources was realistically available. It was believed by the songwriting community that the denial of certification by the United States Supreme Court, marked an end to the history of litigation challenging the legal effect of the "blanket license." The *Buffalo* case was preceded by a similar lawsuit initiated by CBS on behalf of the three major television networks, and which resulted in a like finding.

Undaunted, the plaintiffs have now turned to Congress to reverse this decision. Congressman Fredrick C. Boucher (9th District, Virginia) has introduced H.R. 3321 seeking to bar ASCAP and BMI from issuing a blanket (or indeed any) license to independent commercial television stations, the passage of which, when viewed by America's songwriters, would be devastating. The key portion of the proposed legislation reads "[N]o owner, assignee, or licensee of a copyrighted audiovisual work may convey the right to perform publicly such work by non-network commercial television broadcast without simultaneously conveying the right to perform in synchronization any copyrighted music which accompanies such audiovisual work." A companion bill (S. 1980) has been introduced by Senator J. Strom Thurmond (South Carolina).

The legal history of challenges to the blanket license is long and arduous. Since 1936, the United States District Court for the Southern District of New York has supervised

rates charged by ASCAP for its blanket licenses. (Continuing forum has therefore been available for those seeking redress from what they consider unreasonable rates for the right to perform copyrighted music and lyrics. Given this history and background, what interest does Congress serve by involving itself in the musical marketplace and who would be the true beneficiaries and victims of the enactment of H.R. 3321 and S. 1980?

The plaintiffs in the *Buffalo* case were a class of approximately 400 owners of local television stations owning approximately 750 stations. Since 1949 most of these stations have been represented in negotiations with ASCAP and BMI by the All-Industry Television Station Music License Committee (herein: "All Industry Committee"). The defendants comprised approximately 60,000 writers and 30,000 publisher members or affiliates of ASCAP and BMI. The music performed on these stations consists of either theme, background or feature music. The focus of the litigation was the vast majority of music aired by television stations in connection with syndicated programs and motion pictures selected not by stations but by the producers of programs. These producers, or "syndicators," supply each station principally with either feature length movies or one hour or half hour films or video tapes. Syndicated music is, in 90 percent of the cases, created by a composer under an "employment for hire" agreement with the producer of the television program. The copyright vests in the producer. In the prototypical agreement, the producer (as the employer-for-hire) assigns to the composer and a designated music publisher the "performing right" in the music. (The producer is not legally obliged to acquire the performing right since neither the making of the program nor its sale to a television station is a "performance" which requires a performing rights license).

The Court, in determining what means were realistically available to

local television stations to acquire nondramatic musical performing rights other than via the blanket license, analyzed the per-program license, source licensing and direct licensing.

Some brief definitions are in order. The vast majority of licenses are secured by stations under a "blanket license" from ASCAP and BMI permitting use of any and all of the music in the ASCAP/BMI repertoires for a stated consideration (normally a percentage of the station's advertising revenue). ASCAP and BMI are also required to make available a "program license" which in effect is a mini-blanket license for a particular program. The television station may elect to operate outside the aegis of ASCAP/BMI and acquire the performing right directly from the producer of the television program. That transaction is known as "source licensing." If the television station obtains the performance right directly from the composer it is known as "direct licensing." The existence of source and direct licensing is an outcome of prior antitrust litigation which foreclosed either performing rights organization from acquiring exclusive performing rights from its members/affiliates.

The Court then analyzed the facts to determine whether such alternate forms of license were realistically available to the television stations.

A. Program License — In overruling the District Court, the Court held that plaintiffs had failed to show that the program license was not a realistic alternative. In response to their complaint that it cost more to acquire a program license, the Court opined that since the percentage of revenues to which it applied only related to a particular program (unlike the blanket license which applied to revenue from all programming which employs music) the higher cost would appear justified. Furthermore the Court found that the rate differential was a result of the plaintiffs' own negotiation in a prior case in which the All-Industry Committee pressed for a reduction in the blanket license rate, as differentiated from

the program license. Indeed, held the Court, the fact that compared to the blanket the program license was "too expensive" probably reflected a bargain rate for the blanket license as to which plaintiffs had no reason to complain. Even if plaintiffs had demonstrated that the program license was too high, they were entitled to initiate proceedings before the Southern District (Judge William C. Conner) which has continuing jurisdiction over rates charged by ASCAP for such licenses. In such proceeding the burden is upon ASCAP to prove the reasonableness of the rate.

The Court dismissed the argument that the record keeping necessary to secure a program license was unduly burdensome because no evidence was introduced to support plaintiffs' claim. While the Court acknowledged that more record keeping would be required to support payments under a program license (i.e. what music is used, length of use, whether the music is copyrighted) than in securing a blanket license where none of these factors come into play, it found that such record keeping was not unreasonable.

B. Direct License — For over twenty years, the Court pointed out, no television station ever attempted to secure a direct license for use of music from the composer. Conceding that some intermediary would be necessary in order to negotiate the performing rights license with the thousands of licensees, the Court referred to the functions of the Harry Fox Agency (synchronization rights licensing) as an example of an organization performing like functions. The plaintiffs, arguing that unlike CBS they did not have the market power to effectuate a system for such licenses, failed, according to the Court, to prove a mechanism was not available to handle direct licensing if the stations offered to pay royalties directly to the copyright proprietors. The fallacy of their argument was borne out by the existence of a clearance mechanism to secure music rights for locally produced programs.

C. Source Licensing — The Court found that failure of the stations to acquire directly from the producer (who in the vast majority of cases owns the music under an employment for hire agreement) the performing rights along with all other rights in the program was not because of any inability but rather their failure to negotiate for same. The Court found that the plaintiffs failed to prove the unavailability of this license procedure since the only time

they ever sought to utilize them was during the pendency of the lawsuit and even then they offered no additional compensation to the producer. Notably absent from all correspondence introduced by the plaintiffs was any offer of money.

Finally the plaintiffs argued that the blanket license should be outlawed because it was "unnecessary." In their view, the blanket license was suspect because there is no price competition among the songs comprising the ASCAP/BMI catalogs. The Court stated, "a licensing system may be 'necessary' in the practical sense in that it is far superior to other alternatives in efficiency and thereby achieves substantial savings of resources to the likely benefit of ultimate consumers who usually end up paying whenever efficient practices are replaced with inefficient ones."

Further, the evidence does not establish that barring the blanket license would add any significant price competition among songs:

"With this degree of price competition for music on syndicated programs already in place, it is entirely a matter of speculation whether replacement of the blanket license with source licensing would add any significant increment to price competition at the point where the syndicators decide which music to use. And since music is such a small portion of the total cost of a syndicated program to the television stations, and would still be even if performing rights were acquired at the source and included in the total price to the station, it is also a matter of speculation whether any significant increase in price competition for music would occur when television stations decide which syndicated programs to purchase in a world of source licensing."

Having failed in court, the plaintiffs have turned to Congress. Who will be the true beneficiaries of the Boucher Bill?

Based on findings elicited at the District Court trial, the following facts appear:

A. As of 1982 there were approximately 750 local television stations; approximately 600 of which are affiliated with the three television networks and 150 are independent. Sixty-five percent of the television station owners owned one station; Metromedia and Storer owned seven local stations.

B. ASCAP and BMI license on behalf of tens of thousands of members and affiliates. ASCAP licenses on behalf of approximately forty affiliated foreign performing rights licensing

societies and BMI has reciprocal agreements with thirty-nine foreign licensing societies, under which they license music from their repertoires in the United States.

C. Competition within each television market for the desirable programs, on whose acquisitions the viability of most local stations depend, is vigorous.

D. A significant portion of music used on local television programs is background music. While the composition of background music may often require great expertise and may significantly contribute to the overall entertainment value of a program, such music is usually interchangeable.

E. A small but increasing portion of the syndicated programming broadcast domestically is produced in foreign nations.

F. The amount which local television stations pay ASCAP and BMI for their blanket licenses, while substantial, is but a small fraction of the stations' revenues.

G. The cost to the program producer of obtaining music is typically 2 percent or less of the total production costs of the program.

H. In 1979 only 13 percent of all ASCAP and BMI publishers received any television distributions and less than 3 percent received more than 75 percent of all ASCAP and BMI television performance royalties. However, the District Court stated that there is no indication that the blanket licensing system is the cause of few composers (as distinguished from the many) earning royalties attributable to performance of their compositions on local television stations, and that source licensing might produce the same result.

The above facts evidence a strong and competitive television marketplace, with stations vying for producer-product — the program. The stations are licensed by the Federal Communications Commission and because of the limited number of available channels in free television, having been given a government franchise to operate via a license which is subject to renewal based on FCC standards. FCC reports show that in 1980, on the average, VHF stations earned profits before taxes equal to 97 percent of the value of their net tangible assets. In effect, each television station is a monopolist over a given airwave. Price competition for programming, while competitive, can hardly be said to be affected by the cost of music which is a miniscule factor in the overall cost

of acquiring a program for local TV showing.

Compare this to the vigorously active competition among songwriters. Not only must the composers compete with one another to have their music adopted for a television program the fee for which is relatively low, but he/she must then depend on the success of the program, in order to gain a portion of the performance revenue derived from licensing. In this highly competitive structure, the only group which requires protection is the songwriter — for he/she is competing against virtually insuperable odds: competition with over 60,000 ASCAP/BMI songwriters (excluding foreign songwriters).

Why should Congress enter into the business of dictating to owners, assignees or licensees of copyrighted audiovisual works the manner in which rights can be licensed to non-network television stations? Facts cited in a recent article amply demonstrate that the value of local TV stations has soared.¹ These stations, which operate under a government franchise, are virtually a protected industry. No television station has lost its license since 1969.² Independent television stations have also been beneficiaries of government regulations in the form of the "must-carry" rules, FCC regulations requiring cable television operators, upon request and without compensation, to transmit to their subscribers every over-the-air television broadcast signal that is "significantly viewed in the community" or otherwise considered local under FCC rules.³ Unlike the steel, automotive and shoe industries, television station owners are hardly an endangered industry. The only endangered species is the songwriter, who is at the lowest end of the pecking order⁴ and it is this group, alone, that will suffer from enactment of this ill-advised legislation.

The Boucher Bill would impose the obligation on those conveying synchronization rights to a musical work in the independent television market to convey simultaneously the right of performance. The language of the bill clearly imposes upon programmers and syndicators an obligation which is unnecessary.

The Court of Appeals decision in *Buffalo* reveals that no independent television station is obliged to use the blanket license. There are readily available three other licenses which would enable them to clear their music, i.e. program license, the direct license and the source license. Independent television stations have elected (as evidenced by the *Buffalo*

decision) not to employ these alternatives. Now they seek refuge in Congress by asking it to dictate to program suppliers the manner in which they must do business. Why should Congress involve itself in imposing its will over the manner in which the copyright proprietor licenses his/her performing right?

The second part of this article will discuss the reasons offered by Congressman Boucher in support of his bill.

Contrary to his assertions, it will not promote competition among songwriters and will not reward "better" music. Instead, most songwriters, lacking bargaining power, will continue to receive nothing more than a modest upfront payment for their talents. Those few who can bargain for ongoing payments will not be in a position to monitor them.

The bill will return songwriters to the position they occupied in the first decades of this century. Unsophisticated songwriters often disposed of all rights to their songs in return either for lump-sum payments or for payments based only on the amount of sheet music that was sold. Under such deals, the writers received nothing for performance royalties or for mechanical royalties, no matter how big a hit the song became.

The present bill would recreate that situation as to music used on syndicated television. The independent television stations will save money (thereby enriching a highly profitable and protected class of station owners) and the songwriters will be the losers. But in the end, it is the public that will lose. The prospects of diminishing returns in an already precarious profession will result in fewer people contributing their talents to the creation of music, resulting in less creative product offered to the public.

(1987), cert. denied, 289 U.S. 1045 (1983).

(8) 848 F. Supp. 274 (S.D.N.Y. 1982).

(9) U.S. v. ASCAP (Application of Shenandoah Valley Broadcasting, Inc.) Civ. No. 13-83 (S.D.N.Y. July 28, 1983).

(7) 744 F.2d at 822.

(8) Id. at 822-33.

(9) Exhibit DX 249(n) in *Buffalo* case.

(10) "Special Report — Changing Hands 1983," *Broadcasting*, January 27, 1984 (p. 31).

(11) Penalar, "Bail the Airwaves and This Time Pay the Owner," *Wall Street Journal*, February 27, 1984.

(12) 47 C.F.R. §§73.37-74.3. The "must carry" rules were held to violate the First Amendment in *Quincy Cable TV, Inc. v. FCC*, 785 F.2d 1555 (D.C. Cir. 1983). However, it now appears that leaders of the major cable and broadcast television industry associations have reached an agreement on this issue to the effect that the "must carry" rule would apply only to cable operators with a large number of active channels. The FCC will consider whether this accord or other agency approaches will form the basis of new regulations. "TV Groups Reach Pact on Must-Carry Rule," *New York Times*, February 28, 1984, p. C-2.

(13) See, generally, Copyright Royalty Tribunal, "Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords: Rates and Adjustment of Rates, etc." 48 F.R. 10186 (2/2/81), reprinted in *CCM Copyright L. Rep. Para. 12,612*.

⁴1984 Alvin Deutsch.

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(1) 744 F.2d 917 (2d Cir. 1984).

(2) 84 L.E.D. 26 229 (1986).

(3) CBS, Inc. v. ASCAP, 620 F.2d 830 (2d Cir. 1980), cert. den'd, 450 U.S. 970 (1981).

(4) See e.g., U.S. v. ASCAP, 1940-43 Trade Cas. (CCN Para. 58,194 (S.D.N.Y. 1941)); U.S. v. BMI, 1940-43 Trade Cas. (CCN Para. 58,098 (S.D.N.Y. 1941)); *Aldon-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1944); *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948), appeal dismissed, 177 F.2d 816 (8th Cir. 1949); U.S. v. ASCAP, 1950-51 Trade Cas. (CCN Para. 62,983 (S.D.N.Y. 1950)); U.S. v. BMI, 1944 Trade Cas. (CCN Para. 72,941 (S.D.N.Y. 1944)); U.S. v. ASCAP (Application of Shenandoah Valley Broadcasting, Inc.), 280 F. Supp. 898 (S.D.N.Y. 1967), aff'd, 331 F.2d 117 (2d Cir.), cert. denied, 377 U.S. 937 (1964); CBS, Inc. v. ASCAP, 600 F. Supp. 787 (S.D.N.Y. 1975), rev'd, 603 F.2d 130 (2d Cir. 1977), rev'd, BMI, Inc. v. CBS, Inc., 441 U.S. 1 (1979), on remand 600 F.2d 930 (2d Cir. 1980), cert. denied, 460 U.S. 970 (1981); BMI v. Moor-Law, Inc., 837 F. Supp. 788 (D. Del. 1981), aff'd mem., 901 F.2d 690 (3d Cir. 1982); *K-91, Inc. v. Gerhart Publishing Corp.*, 372 F.2d 1 (9th Cir.

SUPPLEMENTAL EXHIBIT "4"

NEW YORK LAW JOURNAL—Friday, March 14, 1986

ENTERTAINMENT SECTION

The Buffalo Shuffle: Would This Latest Twist Deny Songwriters Payment for Performance?

By Alvin Deutsch

This is the second of a two-part article. Part one appeared Friday, March 14, 1986. Summarized (and italicized) below are the reasons given by Congressman Boucher for introducing H.R. 1134.

"As television producers would be compelled to acquire from the creators of theme and background music performance right (presently assigned to each of these people) as part of the overall agreement for the timing of such music, the fees received by the creators would be commensurate with their talents. However, as much of the music that is used is effectively interchangeable, and result may well be that producers will comb the marketplace for music at the lowest cost, thus becoming a minor consideration.

The most talented songwriters would benefit. To the contrary, the most talented would not necessarily benefit, since they may well receive only a one-time payment — with no subsequent payment for reuse. The bill does not require this, and even if it did — who would examine a fair re-use payment and would monitor the obligation? One: The Harry Fox Agency, which deals with thousands of synchronization licenses, is not a monitoring agency, and negotiates solely on a one-time payment. For reuse payments to occur, they must be monitored — as they are by ASCAP/BMI — suggest that a new organization could be created for such purposes, essentially for the proper recognition of payment for performance.

Furthermore, who is to judge the relative talent of writers? Success of a writer does not necessarily mean that he/she is the most talented. After, may at a given moment appeal to the public taste or indeed to the wherewithal, for reasons other than talent, to achieve stardom in a given field. In the field of television, background scoring may represent a particular talent, which is not necessarily the same as writing for a play or the symphonic field. However, named, and despite the name of Rep. Boucher, no one can judge what theme or background music is superior to another. Thus, Congressman's proposed bill has nothing to do, as he purports, with quality.

"The Congressman espouses the Darwinian belief that under his bill, 'strong' music will drive out the 'weak.' But no program producer, before the fact, knows whether the music to be written for a program will be 'strong' or 'weak.' Program producers assuredly attempt to negotiate with a writer to accept as low a fee as possible, but such payment does not bear any necessary relationship to the quality of the end product. Novice composers in television will, like their counterparts in art, theatre and literature, have an inferior bargaining position in comparison with established members of their class — but that has no direct bearing on the quality of their work.

An example is in order. Some 18 years ago Charles Strouse and Lee Adams (having written "Bye Bye Birdie") were requested to write a little song for an unborn television series which eventually became known as *All in the Family*. This was their first endeavor in the television field. The upfront money for the theme song was negligible. The writers jointly shared \$2,000, which included their costs for arranging, copying, recording, and hiring a recording studio and accompanist. (The 1984 Court of Appeals decision in *Buffalo* noted that upfront payments varied from a "few hundred dollars to several thousand dollars.") While Strouse and Adams were selected because the program producer believed they would write "quality music" their upfront payment was, to say the least, modest.

All in the Family became a household fixture. "Those Were the Days," the theme song, became a standard. Today it is identified in the public mind not only with the success of this television program, but its music and lyrics have become a symbol of the theme, plot and characters of the program, even when performed independently of the TV series. Had Strouse and Adams not been compensated by payments from their performing rights organization which logged repeated showings of *All in the Family* commencing with network programming, through syndication, and foreign distribution, they would have received a pittance for their original creation. Everyone associated with the program would have been handsomely compensated and quickly identified whenever the song was played, except Strouse and Adams. If

the stations playing their theme were exempt from paying performance fees, it would have enriched no one but the station owners.

Congressman Boucher further states: "If strong music raises the price, the marketplace will ultimately reward the composer. The composers who contribute to Miami Vice will be entitled to a greater reward when the program goes into syndication than those who provide theme and background music for 'Divergence Court.' However, the Congressman once again exposes his unfamiliarity with the world of music: If a song is the theme of a totally unsuccessful television show, then the song dies when the show dies. If a song is a theme of a highly successful show there is greater exposure, and thus the greater the opportunity that the song will become a success, both in the television program and in the marketplace outside the television program. Continued use is the hallmark of success.

No prophet (and no musicologist) can determine in advance what music will succeed, and what music will endure. Particularly in the case of theme and background music, success of the music itself goes hand in hand with the success of the program on which it is synchronized and performed. Thus there is no merit in Congressman Boucher's position that good music will 'out' by being recognized as it is performed. It is for history to judge its merit.

The Congressman further claims that "The composer's share will not be based on an arbitrary formula as is now the case. You can be sure that star music will command star residuals in syndication." What system is proposed to separate "star music" from "featured music" from "hit player music" from "walk-on music." There is no such system and no such standard in the field of music. The present system of logging continued performance of music is the only realistic method of insuring that the composer's rights, as guaranteed in section 106 of the Copyright Act, are protected.

Under the present blanket license scheme, a small percentage of writers garner the largest share of revenues from televised performances of music. However, this is merely a fact of life in all artistic endeavors. A handful of athletes garner the lion's share of players' salaries; an even smaller group of talented performers reap

the major benefits in the acting community; an infinitesimally small number of authors dominate the best sellers' list, *ad infinitum*. However viewed, the ability to capture the public imagination and taste eventually places a very small segment of a particular group at the top.

Furthermore, this argument is misleading in its purported appeal to fairness to songwriters generally. As noted above, the District Court opinion in *Buffalo* acknowledged that under source licensing the very same small group of songwriters may well continue to control the market."

4. The proposed bill would not eliminate the right of continuing payment for continuing use of music. The Boucher Bill would however, if enacted, result in program producers bargaining with songwriters over the price of performing rights to achieve the greatest saving, forcing the composer, faced with a limited market controlled by "a handful of companies, to accept the minimum fees with no hope of compensation for continued airplay. As noted in the second point above, the bill does not require reuse payments. Even if reuse payments could be negotiated, there is no monitoring system available to the songwriter. The effect: each time a program is repeated both in and outside the United States, there would be no compensation to the composer based upon "performance." However, the *sine qua non* of the performance right is that the composer should be compensated every time his/her work is performed.

Composers Not in Unions

Unlike writers, directors and other creative television personnel, virtually all of whom are members of unions, composers are not union members. Union contracts have substantially increased the basic fees paid to their members, who are fur-



Alvin Deutsch

ther recompensed by residual payments reflecting continued use. Unlike their fellow workers, composers receive small upfront fees and depend on payments from ASCAP/EMI to compensate them for their talent. Since ASCAP/EMI will be forbidden to separately license performance rights under H.R. 3521 there would now exist no system to monitor continued use. Both renowned and relatively unknown songwriters would be losers.

It was argued in the *Buffalo* case that if the blanket license were declared anticompetitive, copyright owners would "surely unite to form an anticompetitive guild with minimum fees and residual rates that would be shielded from antitrust scrutiny by the labor exemption." In rejecting this contention, the District Court stated: "Assuming that the unionization threat is real, the court cannot be deterred from remedying an antitrust violation by the fact that Congress has chosen for various reasons of social policy to insulate from antitrust attack activity that may result from the remedy fashioned here. The unionization threat does not therefore preserve the blanket license."

However, two years later, in a decision of the National Labor Relations Board, *Aaron Spelling Productions Inc. and Society of Composers and Lyricists*, the Regional Director of the NLRB in Los Angeles determined that composers and lyricists working for various motion picture and television production companies are independent contractors. He dismissed their petition seeking recognition as a labor union representing the artists. In so holding he found that the studios do not control the manner and means by which music is produced although the studios may control the way the music sounds so that it complements the production for which it is written.

Thus, not even unionization is available to composers and lyricists to implement any scheme involving a reuse payment, were one offered.

No Benefit to Public

Even if reuse could be effectively monitored by songwriters, what would composers receive for reuse of their music on independent commercial television? Ideally in the mind of both the producers and the independent television stations — nothing! The Boucher Bill does not require any payments for continued use, and the thrust of the market place would inevitably result in one-time payments at minimal prices, garnering enormous savings for television stations, none of which will redound to the benefit of the public. There is a salacious thread of reasoning that permeates the intellectual property field, to wit: if the cost of the copyright can be reduced, or better yet eliminated, the public will benefit. While a superficially convincing theory, it has no basis in reality. No Broadway play, first run movie, book, or choreographic work costs the public less because the copyright fee is eliminated. Why? Because in all artistic endeavors the cost of the copyright is minuscule compared to the product into which it is integrated. And the same is most assuredly true for television movies or a TV series.

To quote the adage: If it ain't broke, don't fix it! As the Court of Appeals

stated in *Buffalo*, independent television stations are able, now, to accomplish direct and source licensing of music — and have freely elected not to do so. Even during the pendency of the *Buffalo* case, independent television stations made only colorable attempts to commence negotiations for source licenses, and in none of them did they actually offer additional payments to program producers for the acquisition of the performing rights.

Who Benefits?

Who, then, are the proponents and beneficiaries of this bill?

Much light is shed on this question by reference to an action commenced in June, 1965 by BMI against the All-Industry Committee and a group of independent television stations¹² all of whom are shareholders of BMI and many of whom are members of the Committee.

Following the Court of Appeals decision in *Buffalo*, the management of BMI sought retroactive payment of television fees which had been frozen by the District Court judge. Unable to successfully negotiate the back-payment issue with the All-Industry Committee, BMI placed its licensees on notice that from and after June 30, 1965 their failure to have a license would be treated as an act of copyright infringement. In response, the All-Industry Committee called a special shareholders' meeting to adopt new by-laws and resolutions that BMI claimed would in effect prevent it from acting individually with its licensees and force it to deal with the All-Industry Committee. Since the existing rates for BMI were 55 percent of the amount the independent television stations paid to ASCAP and since the BMI administration was seeking an increase in its percentage, it viewed the effect of the shareholders' action as trying to freeze the BMI rate at 55 percent, to the detriment of its writer and publisher affiliates, thereby eliminating its competition with ASCAP.

The suit alleged that the defendants had entered into a price-fixing scheme to inhibit BMI from offering licenses to individual television broadcasters except on terms approved by the All-Industry Committee, and to force BMI to deal with the All-Industry Committee and to coordinate the conduct of television broadcasters so that they will not accept the licenses offered by BMI unless they provide for fees not greater than 55 percent of fees the stations pay to ASCAP. The action sought to enjoin the calling of a special shareholders' meeting by the named defendants to vote upon the proposed by-laws and resolutions.

BMI Under Attack

Since its founding in 1938, BMI has been the subject of many challenges. Claims have been made that since its shares of stock are owned by the very people with whom it negotiates, it artificially depresses music rights prices. BMI has successfully defended each of these allegations and has thwarted such attacks of collusion, as most recently evidenced by the following statement in *United States v. ASCAP*:¹³

"[A]lthough I share with ASCAP a certain uneasiness over the inherent conflict presented by broadcaster ownership of BMI, actual events have tended to belie this concern and to demonstrate that the conflict is more theoretical than real."

The effect of these resolutions if passed, according to BMI, would have obliged it to negotiate on behalf of all of its members solely with the All-Industry Committee, thereby stifling competition. It is indeed the reverse side of the complaint of the All-Industry Committee in its suit against ASCAP and BMI in the *Buffalo* case where it claimed that the pooling of copyrights under the blanket license was a violation of the antitrust law as being a disincentive for competition.

The Court denied BMI's motion enjoining the holding of the shareholders' meeting, citing the fact that the plaintiffs had failed to show that the holding of the meeting would itself cause irreparable harm to BMI. At the same time, it denied defendants' motion to require BMI to refrain from negotiating directly with individual broadcasters.

Boost for Independent TV

The Boucher bill would achieve the same result which the television stations appeared to have sought in the courts and through corporate maneuvering. It would effectively bar ASCAP and BMI from negotiating with independent television stations. The only beneficiary of the Bill would be the individual non-network television broadcasters.

The bottom line is that the Boucher bill will not promote competition among songwriters and will not reward "better" music. Instead, most songwriters, lacking bargaining power, will continue to receive nothing more than a modest upfront payment for their talents. Those few who can bargain for ongoing payments will not be in a position to monitor them. The bill will return songwriters to the position they occupied in the first decades of this century. Unsophisticated songwriters often disposed of all rights to their songs in return ei-

ther for lump-sum payments or for payments based only on the amount of sheet music that was sold. Under such deals, the writers received nothing for performance royalties or for mechanical royalties, no matter how big a hit the song became. The present bill would recreate that situation as to music used on syndicated television. The independent television stations will save money and the songwriters will be the losers. But in the end, it is the public that will lose. The prospects of diminishing returns in an already precarious profession will result in fewer people contributing their talents to the creation of music, resulting in less creative product offered to the public. As Judge Winter so aptly stated in his concurring opinion in the *Buffalo* case: (744 F. 2d 917, at 933):

"I disagree with little stated in Judge Newman's thoughtful and comprehensive opinion. I write separately because I believe that it demonstrates that the blanket license as presently used cannot have an anti-competitive effect and hope that his analysis, used out of context, will not lead to future needless litigation over blanket licenses in the music industry."

Is it worth jeopardizing the nation's pool of artistic creation for the sake of the pecuniary interest of our healthy independent television station industry?

(14) Boucher, "Copyright Reform: Good Music the Winner," *Billboard*, Jan. 25, 1966, p.18. Further references to Boucher's views are based on this article.

(15) 346 F. Supp. at 264 n. 28.

(16) 16, at 296.

(17) 16.

(18) Case No. 31-RC-3755 (National Labor Relations Board, Dec. 14, 1964) cited in 6 Entertainment L. Rep. No. 18, p. 7 (Mar. 1965).

(19) BMI v. All-Industry Television Station Music License Committee, 65 Civ. 4507 (S.D.N.Y. June 21, 1965).

(20) A proposed amendment to the BMI by-laws read in relevant part:

"The Corporation shall take no action with respect to procuring or entering into any license agreements or contracts (or the renewal or non-renewal of any license agreements or contracts) between the Corporation and any broadcaster, except by the approval of a vote of three-quarters in number of the Board of Directors then in office (and no such action may be taken by any officer or committee of the Board of Directors), provided that the Board of Directors may authorize any officer to enter into any agreement or license approved by the Board of Directors as provided herein, but only with respect to all material terms approved by the Board and on

substantially the same terms as approved by the Board. This Section shall not be amended, altered or repealed except by the holders of a majority in number of the issued and outstanding shares of the Corporation."

A proposed shareholder resolution read:
 "RESOLVED, until such time as the BMI consent decree is amended to provide for a rate court for BMI's television broadcast licensees (or, failing approval by the Government of a joint, consensual proposal for such an amendment, such time as BMI shall enter into a written agreement with representatives of BMI's local television broadcast licensees providing for an alternative mechanism for determining BMI license fees and matters pertaining to interim licensees in circumstances where BMI and its television broadcast licensees are unable to reach agreement), the shareholders of BMI request and recommend that management and the Board of Directors (i) maintain the status quo with respect to BMI's license relationships with its local television broadcast licensees, whereby the station licensees pay BMI 85 percent of any payments for license fees as are made to ASCAP, and (ii) refrain from forwarding, without the consent of the industry-wide representatives of BMI's local television broadcast licensees, any proposed license agreement(s) (or renewals of license agreement(s)) to any actual or prospective local television broadcast licensees of BMI (with the exception of television broadcasters coming on the air after the date hereof, which shall be governed by the same practices as have been in effect for new stations since February 1, 1963)."

(21) 1964-1 Trade Cas. (CCM) Para. 66,917 (S.D.N.Y. 1964).

(22) It is interesting to note that the Boucher bill does not affect network broadcasting.

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Alvin Deutsch, a partner in the law firm of Linden and Deutsch, has for over fifteen years served as counsel to the Songwriters Guild of America (formerly: "The American Guild of Authors and Composers — AGAC). The author is indebted to his associate, Robert C. Harris, for his insight, assistance and critique.

Senator MATHIAS. Thank you for your statement.
Mr. Post.

STATEMENT OF MIKE POST

Mr. Post. Thank you, Mr. Chairman, Senators.

I believe the reason I was chosen to come and speak before you today is the fact that I am pretty typical of the people that write music for a living, in that I started as a musician playing in the clubs around Los Angeles, and progressed on to working as a studio musician and became an arranger and a record producer, the whole time writing songs and trying to get them listened to or recorded or published. And it eventually led me to my current position as a television composer.

I think if you charted my career, it would be fair to say that it has been a steady uphill climb from the street level. And if I can toot my own horn, myself and my partner, Pete Carpenter, are currently responsible for supplying all the music for 7 hours of prime time. Our shows include "Hill Street Blues," "Magnum, P.I.," the "A-Team," "Hardcastle and McCormick," "Riptide," "Hunter," and "Stingray."

In the past, we have done all the music for "Rockford Files," "White Shadow," "Baa-Baa Black Sheep," and several other short-lived series.

What I am not is a cartel. I do not think I am incidental, I am not a kickback. I hope I am not outmoded yet. I am not an additional composer, I am not a qualitative element, I am even not the guy that wrote "Miami Vice," which is something they—the broadcasters—credited me with today. [Laughter].

But what I think I am is a guy that makes his living writing music. And I have heard a lot of people talk today, and I think I am the first guy to come here and talk to you that makes his living writing music.

My perspective is not technical. I do not have any charts with me, and I am not going to talk about numbers. I would like to tell you that composers are paid basically two ways. The first way is that we get a fee of approximately \$3,000 to \$4,000 per 1-hour segment, and that fee is paid by the producers.

Take the case of "Magnum, P.I.," Universal Television hires us as an independent contractor on a show-by-show basis. We are not represented by a guild or a union. We are only as good as our last score.

The other way we are paid, and by far the more important way that we receive money, is through performances.

Now, the broadcasters have said that what they want to do is negotiate with us individually. Well, that is not true. What they want to do is to buy the shows from the producers with the rights included. And what will happen, in my view, is very clearly the producers will come to us, and they will pressure us and coming new composers to supply the music for their shows for the same fee without any possibilities of future royalties.

I remember back to when my partner, Pete Carpenter, and I first started. By the way, he is 30 years my senior. And I remember one night we were working out in back of his house, and we were on

our fourth day of 18-hour days and we were out of time and we were out of ideas, and we were out of patience. And I turned to him and I said, "Is this really worth it? I mean we are killing ourselves here. Is this really worth it?" And he turned to me and he said:

Let me tell you something, kid. Many years from now when I am dust and you are old, this segment of "Rockford Files" will play some place in the United States, and my heirs and you will receive a payment."

If this bill passes, all bets are off.

I would like to quote something from the broadcasters. The broadcasters have said that the present blanket licensing system, and I quote:

Subsidizes the production of mediocre music contained in syndicated television programs and tips demand for television music toward established creators and away from newcomers.

Well, let us forget the fact that they said that my music and other people's music is mediocre. I do not know how they make that judgment. But let us just take their point about newcomers.

Their statement is not true, completely 100 percent not true. I am living proof of it. Ten years ago, I was a newcomer. And before I was a newcomer, Henry Mancini was a newcomer. We have established six people that are working for us at the present time that are newcomers. The present system works for newcomers.

As a point of personal privilege, if I may take 1 or 2 more minutes, I would like to tell you something that has come to light that I think is pretty interesting.

I am told that last week the broadcasters had some investigators out in L.A. looking into the ways that myself and my partner do our business. Well, first of all, that is kind of flattering. I guess that may mean that the broadcasters felt that the testimony that I gave in front of the House subcommittee was effective.

I have heard that they plan to come to the Senators one on one after this hearing, and basically say, "Hey, do not listen to this guy, Mike Post, because he has a staff of ghost writers, and he doesn't really write the music; he just takes all the credit for it."

Well, I am honestly happy they decided to do this because it gives me a chance to tell you how our business works and how Pete and I have helped to change our business in a very positive way.

Now, I do not know if Senators have the time to write every word of every speech that they make, or if they have—

Senator MATHIAS. That is not a question you ever ask. [Laughter.]

Mr. Post. Well, let me put it another way. I do not know if Senators have the time to do all the research on every bill that they vote on. Is that any better?

Senator MATHIAS. That is better. [Laughter.]

Mr. Post. That got a red light so it definitely—

Senator MATHIAS. You got your answer. [Laughter.]

Mr. Post. Well, Pete and I have found it humanly impossible to write every piece of music for every show. So we currently have a staff of six newcomers to fill in some of the blanks.

Before us, composers that filled in blanks were called ghosts, they were invisible.

Our staff not only shares in the cue sheet credit, in other word, participating in the BMI-ASCAP or SESAC royalties, but we pay them part of our fee that we get from the producers for composing the music. And, in addition, the producers are made very well aware of who writes what, when, and how.

I am proud of that. That is something that I have been able to do for my business, starting as a newcomer.

You know, I think this is kind of simple. You heard from a panel of broadcasters that have a vested interest and tell you why you should vote for this bill. And you are hearing from our panel, who also has a vested interest, and we are telling you why you should not vote for the bill. But you heard from Mr. Oman, who does not have a vested interest. He works for the Government. And he has told you that this bill would hurt composers, it would hurt the public. I believe strongly that the quality of music would plummet.

I do not think it is fair. I do not think it is right. And you certainly should not vote for it.

Thank you.

[Mr. Post's statement and joint responses of BMI and Mr. Post to written questions, subsequently submitted for the record, follow:]

PREPARED STATEMENT OF MIKE POST

Mr. Chairman, my name is Mike Post. My partner, Pete Carpenter, and I are presently responsible for the creation of music for seven hours of prime-time television each week, including "Hill Street Blues," "Magnum, P.I.," "The A-Team," "Hardcastle and McCormick," "Hunter," "Stingray," and "Riptide." I am told that no other composers in television history have ever approached this record.

Pete and I are also responsible for the creation of the music for several prime-time television series first aired in the 1970's, such as "The Rockford Files," which are still seen and heard in syndication.

Today, I want to tell you why enacting a law which would change the way in which I am paid for my work would be bad for the public, and bad for me. I regret that Pete is not appearing with me, because he has a very special perspective on this matter. However, I am pleased to speak for him, and for every other music composer I know, against ill-advised proposals like the bill, S. 1980.

It is extremely important for Congress to know why the creators of music are against S. 1980. The overriding feeling I have about my music career -- my whole life -- is how fortunate I am. I have been able to make my living doing something that I really love to do. But let me tell you, Mr. Chairman, if I could not make a living from composing music, I would have to do something else, and that is the threat which S. 1980 poses for me and my fellow composers. How good will music be when its creation is a hobby, rather than a professional art?

In 1972, when Pete and I were beginning our work

together, we were under the gun to meet a deadline for the music for the television series "Toma." Frankly, we were not getting paid any money for this work. I was wondering if it was worth the effort. Our wives were inside while we chatted about my doubts in the backyard. Pete said, "Yes, it is worthwhile because when I am long-gone, the music will still be playing."

Pete knew what he was talking about from his personal experience. Before I was old enough to have any career, he was collaborating to create the music for a whole host of television series, such as "The Andy Griffith Show," "I Spy," and "Mission Impossible," which are still seen and heard in syndication on local television stations.

But pride and sheer joy in the creation of music is not enough, even if the music lives forever. You know better than I that the right to earn a living from the use of artistic creations is guaranteed by the U.S. Constitution. The tough question is how that compensation should be calculated.

How I get paid for my work is something on which I have expertise. At the time Pete and I were working on the music for "Toma," which ultimately did not enjoy repeated use through syndication, and when Pete was working on shows first telecast years earlier, no one could have estimated how many times those shows would be aired -- and it is the number of performances which should determine how much we should be compensated for our work.

Because there are millions of performances of music on television each year, no single composer or music publisher, no matter how well organized, could afford to monitor all broadcasts to detect performances and due compensation of their music. To provide this accounting, composers and publishers generally

license their music through central clearinghouses, like EMI, ASCAP and SESAC. By the same token, it seems to me that it is much easier for a broadcaster to have a single license for the music it airs than to have to hunt down the copyright owner of each piece of music the broadcaster wishes to play.

We also use these clearinghouses to negotiate with the broadcasters the form of license and the amount of compensation for music performances. Again, it seems to me that it is much more convenient for broadcasters to negotiate these terms with entities like BMI, ASCAP, and SESAC, than to hold individual negotiations with each copyright owner.

There have always been several options for the system or payment which can be the result of these negotiations, but one, the "blanket license," has been continuously adopted. Under this system, the clearinghouse issues blanket licenses which cover most music the broadcasters will use, and then monitors the broadcasters to divide due compensation for music performances according to the number of times it is aired.

The bill, S. 1980, would bar the blanket licensing system and all other options except one: source licensing. Broadcasters support this bill because they believe that a source license system would benefit them. However, the broadcasters are talking about how I and my fellow composers get paid for our work, and I think I know as much about that as they do.

Let me tell you something which you should already know. Because the clearinghouses obtain non-exclusive rights to music, we already have the ability to negotiate a source license fee under the blanket license system. A source license means that the producers of television shows negotiate with music

composers for one-time, upfront fees for music, no matter how many times the show may be aired, and the music thus performed.

Because Pete and I have been so successful in recent years, you might conclude that we would benefit from source licensing in that we could demand large fees for our work based on our success. That would be nice, but it simply isn't the real situation.

Right now, television show producers generally pay music composers only about \$3,000 to \$4,000 upfront for their work for each episode in a television series. This payment includes the composition of the music, the arrangement of its play, and the conducting of the actual recording. The payment for the composing work has run to only \$400 or ten percent, while the remainder is typically musicians' union scale for the ~~arrangement~~ and recording of the music. The bulk of the present upfront payment often depends, therefore, on the amount of time spent in the recording of the music, rather than its composition.

The production of television shows is expensive. Producers do not wish to add to this expense. Instead of paying successful composers like Pete and me large upfront fees, they will turn to others who cannot command that level of payment. Will their music be better than ours? The answer to that question is negative, because the payments would be so small that the composition of music will become a haphazard hobby, rather than an artistic profession.

And if I had to sit down with a producer and negotiate an upfront payment for my music in his show, how could I possibly tell at that time, before the pilot has even been produced, whether the show will get on network TV, whether it will be

successful enough to be renewed for 4 or 5 seasons, will sell in syndication and will last in syndication? With each of those events, my music being an integral part of each episode, will appreciate in value, but this bill will cause me to gamble with what could be 10 years of income -- have I written another "Toma" or another "Rockford Files"? Is my music really worth the same in 1986 as it will be in 1992? I don't think so, but S. 1980 will force me to say yes.

You may reach another false conclusion about source licensing, that even if the upfront fee is small, the music composers could be paid "residuals" each time their work is aired after the fee payment. A residual system sounds plausible because it is used to compensate other artists for performances on television programs.

From my perspective, a residual system would be tantamount to the present blanket license system: a small upfront payment and payments for each performance of my work. For that reason, I cannot see why the blanket license should be barred in favor of the exclusive use of source licensing. In other words, there is no need to clone the present system.

Furthermore, it seems clear to me that the negotiations for the amount of residual payments would occur between artists and producers, to the exclusion of broadcasters. Apparently the broadcasters believe that the producers can do a better job of negotiating than the broadcasters themselves.

Let me conclude by describing another red herring raised by broadcasters who pretend to know more about my business than I do, and to tell you something about how I work which you may not know.

The broadcasters have said that the present blanket licensing system, and I quote: "subsidizes the production of mediocre music contained in syndicated television programs and tips demand for television music toward established creators and away from newcomers".

This statement is a direct, personal insult, but I will turn the other cheek and simply tell you why it is absolutely untrue that the present system discriminates against new music composers.

My entire career is a demonstration of how newcomers can be successful in composing music for television shows. Much of the music on television shows today is written by composers like me, who were not in this field only a short time ago. Statements that new composers are being stifled by blanket licensing are utter nonsense.

Pete Carpenter and I are responsible for the music for six hours of prime-time television each week and have additional shows in development. Television music is more than the theme which we hear at the show's beginning, which identifies the show and entices the public to view it. Television show music also includes scoring for character development, plot sequences and the pure performance of songs. Each show, therefore, requires the composition of an entire, distinct musical score.

Pete and I cannot possibly write each bar of this music alone. Instead, if you will pardon the plug, we have an "A-Team" of composers who help us with our work. These composers will be only some of the newcomers who will succeed in our business, and we have encouraged this creative competition.

Frankly, Mr. Chairman, I am outraged that broadcasters have labeled my music "mediocre," and that they are telling Congress that they know more about what is in the best interest of the people in my business and the public than we do. Each of us can judge the quality of music, and I have not been so vain as to suggest to you that my music is better than someone else's. However, I do suggest to you that before you legislate to change my business, you should listen to us before anyone else, especially when the broadcasters who support S. 1980 have an obvious financial ax to grind. Thank you for giving me that opportunity today.

Responses to Questions from Senator Thurmond

IS THERE ANYTHING ABOUT S. 1980 THAT WOULD PREVENT THE STUDIOS FROM PAYING BMI FOR THE LICENSE TO ALL OR PART OF THE MUSIC AVAILABLE FROM THE SOCIETY AND THEN PASSING ON THE RIGHT AND THE COST TO THE BROADCASTER AS PART OF THEIR NEGOTIATIONS? (Emphasis added)

No, nor is there anything under the present system that would prevent it either. The proposed legislation is, therefore, unnecessary and would merely serve to reduce - rather than to expand - the options now available to the industry.

Specifically, there is nothing contained within S. 1980 that "would prevent the (program producers) from paying BMI for the license....". The suggestion, however, is inherently the same as having the program producers obtain the performance rights -up front - from the composers themselves.

At the time a program is initially produced, there is no way that anyone can predict its future. The vast majority of programs never make it beyond a single season and never go into syndication. A significant number, in fact, never get beyond the initial pilot production. The value of a program, and - by inference - the music within it, can only be established over a period of time as the program is performed. If a program is performed frequently then it is only proper that the composer whose music is a part of it should receive greater compensation than one whose music may have been performed only once. The current system of payment for performance assures this equity.

The legislation currently under consideration would have the effect of destroying this system. It would, in practice, replace the payment for performance concept with a single, up front payment arrangement to be determined at a point in time when neither party knows the worth of their product and when one party to the "negotiation" - the composer - is most greatly disadvantaged.

WHY SHOULD A TELEVISION STATION HAVE TO PAY BMI FOR MUSIC ON THE BASIS OF REVENUE GENERATED FROM ALL ITS PROGRAMMING -- INCLUDING NEWS, SPORTS, ETC. -- RATHER THAN ONLY FOR THE MUSIC USED IN SHOWS YOU ACTUALLY PRODUCE? (Emphasis added)

To begin with, it must be pointed out that BMI does not "produce" any programs. We merely represent - on a non exclusive basis - performing rights held by certain copyright holders whose works are embodied within programs.

As to the specific question, the answer is that stations do not "have to pay" on a blanket license basis. The courts have repeatedly held that alternative licenses are available. The same essential issue was raised - and, we thought, put to rest - in both the CBS and the Buffalo Broadcasting cases.

In his concurring opinion to the decision in Buffalo Broadcasting et al. 744 F 2D 917 (2nd Cir. 1984), Judge Winter thought it necessary to write the following:

"I write separately because I believe that it demonstrates that the blanket license as presently used cannot have an anti-competitive effect and hope that his (Judge Newman's majority opinion) analysis, used out of context, will not lead to future needless litigation over blanket licenses in the music industry." (Emphasis added.)

A broader answer to the question, however, is that this is the fee concept agreed upon - through negotiation - with the television industry. True, in several early negotiating sessions held just before Buffalo Broadcast suit was filed against us, the All-Industry Committee said that they would like to devise a different type of system. We repeatedly asked for their suggestions so that we might consider them. None were ever offered. And, when we all returned to the negotiating table after the Buffalo case was finally decided in our favor, only a revenue based fee was discussed.

In point of fact, when the current blanket license form was distributed to all television stations, it was accompanied by a joint letter from Broadcast Music, Inc. and the All-Industry Television Station Music License Committee. The letter was signed by both Edward M. Cramer, President of BMI and Leslie G. Arries, Chairman of the All-Industry Committee and was dated October 4, 1985 - just four days before this "essential" legislation was introduced into the House and less than three months before it was introduced into the Senate.

In this letter, Mr. Arries said "We are please to enclose copies of the new form of BMI-local television station blanket license agreement which is the result of many months of negotiations between BMI and the All-Industry Television Station Music License Committee.....We think it is a good agreement and therefore strongly endorse it and urge that you execute and return it to BMI promptly." (Emphasis added)

APPARENTLY, BROADCASTERS OBJECT TO THE CURRENT SYSTEM. IF PER PROGRAM LICENSES ARE A SERIOUS ALTERNATIVE, WHY DOESN'T BMI ISSUE MORE OF THEM?

A Per-Program license form exists and broadcasters have been repeatedly made aware of it. We have issued them on request, but they simply have not, in the main, been requested.

The issue of Per Program license availability is reviewed at length in the Court of Appeals decision in the Buffalo Case.

"The fact that very few stations have elected to take program licenses is not evidence that they are priced beyond an objectively reasonable price range. It may simply reflect, as defendants believe, that the blanket license has virtues of convenience that make it a legitimate object of customer preference."

In addition, the court observed that - insofar as ASCAP is concerned - the per program license terms are subject to review by the consent decree court. BMI has voluntarily agreed to a similar procedure.

As to the fee itself, both parties in the ASCAP rate fixing court have already agreed that it is "reasonable and non discriminatory."

WHAT ARE THE PAYMENTS CURRENTLY REQUESTED BY BMI FOR A BLANKET LICENSE FOR TV AND FOR A PER-PROGRAM LICENSE?

Under the present blanket agreement, the current rates are as follows:

For each month of the period January 1, 1986 through December 31, 1986, the final license fee shall be 68% of the amount finally determined to be the amount payable by LICENSEE for Station for an ASCAP blanket license.

If, for any month of the period January 1, 1986 through December 31, 1986, there is an interim license fee (subject to retroactive adjustment) payable by LICENSEE to ASCAP for Station for a blanket license, then the license fee payable hereunder for that month shall be, on an interim basis subject to retroactive adjustment as set forth below, 65% of the amount payable to ASCAP for the month.

The current Per Program rates are as follows and are applied only against individual programs which contain BMI licensed music:

1. Commercial programs - with certain exceptions for those in which there is only minimal use - 5% of net revenue from those programs.
2. Sustaining programs - with certain exceptions for those in which there is only minimal use - 2.5% of highest rate card for applicable time period.

HAS BMI EVER NEGOTIATED SPECIAL ARRANGEMENTS WITH AN INDIVIDUAL STATION WHICH ARE DIFFERENT FROM THE RATES YOU HAVE DISCUSSED? IF NOT, WHY NOT?

BMI is prohibited under the terms of its Consent Decree from offering any discriminatory terms. The decree specifically says we "shall not enter into, recognize as valid or perform any performing rights license agreement which shall result in discriminating in rates or terms between licensees similarly situated" Simply stated, there can be no "special arrangements".

It should be borne in mind, however, that if a new situation arises, then a new license form can be developed to meet it. In an analogous field - radio - BMI did develop, and offer, a Limited Use license to meet the needs of the Talk/News format stations. The license is now commonly used by stations within this particular format group.

HOW MUCH OF THE MONEY COLLECTED BY YOUR ORGANIZATION GOES TOWARD PAYMENT OF YOUR ADMINISTRATIVE COSTS?

It should first be noted that although BMI is a stock corporation whose shares are owned by broadcasters, it is operated on an entirely non-profit basis. Moreover, when BMI was first organized in 1940, it was announced that stockholders should not expect a dividend. None has ever been declared.

To answer the specific question, however, although a 20% administrative cost range is generally considered reasonable throughout the world, BMI's costs for the past several years have remained in the 15-17% range. (They would have been even less if we had not been so heavily burdened by expenses associated with broadcaster instigated litigation.)

Responses to Questions from Senator Specter

I UNDERSTAND THAT THEATER OWNERS CURRENTLY RECEIVE FILMS WITH ALL PERFORMANCE (AS WELL AS SYNCHRONIZATION) RIGHTS TO THE MUSIC IN THOSE FILMS ALREADY CLEARED AND PAID FOR. WHY SHOULD THE SAME RULES NOT APPLY AS WELL TO LOCAL TELEVISION STATION OWNERS WHO MAY BE RECEIVING THE VERY SAME FILM? ARE THERE SPECIAL CONSIDERATIONS WHICH MUST BE APPLIED IN THE CASE OF T.V.?

As a matter of law, theaters are not exempt from obtaining a performing rights license. This oddity - and one which exists only in the United States - is the result of marketplace economics that have developed since 1948.

In 1948, ASCAP was judged to have violated the anti-trust laws in its licensing of theaters. The ASCAP consent decree was consequently amended and its members were prohibited from licensing motion picture theaters. It was, in effect, a penalty levied against the guilty party. The copyright law was not changed in 1948 nor when it was rewritten in 1976 was there a prohibition added against licensing theaters.

With that background in mind, it seems highly unjust that ASCAP members who weren't even born at the time of suit should, today, have to share in the punishment. To then seriously consider extending this "punishment" to still another, completely unrelated group, is unthinkable. As BMI President, Edward M. Cramer, asked during his appearance before the subcommittee, "How does one make the leap from ancient illegal conduct in the film industry to current TV practices?"

In the marketplace as it stands, today, there is no question that a motion picture composer receives more "up front" money for his efforts than does a TV composer. As composer Mike Post testified before the subcommittee, however, the amount is still surprisingly small. But, as he also testified, it is clearly understood that the compensation package also includes anticipated performance money to be earned when the film plays on television anywhere in the world or when it plays in motion picture theaters abroad. An added factor, too, is the likelihood - far greater for motion pictures than for TV - of seeing the release of a music track record album and, thereby, getting additional income from radio performances.

While the "rules" for motion picture exhibition are different than those for TV exhibition, it should be clear that - insofar as composers are concerned - the most significant monetary factor for them in composing for motion pictures is the money they anticipate getting from non-theatrical sources - primarily television.

Aside from individual considerations, however, there are also major differences in the economic relationships between studios and theaters as opposed to studios and TV broadcasters. Most significant among these is the general industry practice whereby the film distributor agrees to theater exhibition of his product only in return for a considerable share of every ticket sold. Nothing comparable exists in their relations with TV stations, but, as one syndicator has already hastened to suggest, they would be only too happy to encourage a similar practice.

THE NUMBERS WHICH HAVE BEEN QUOTED EMPHASIZE THAT ONLY ABOUT ONE THOUSAND COMPOSERS -- NO DOUBT THE MOST WIDELY KNOWN, AND MOST HIGHLY COMPENSATED -- RECEIVE THE VAST MAJORITY OF THE ROYALTIES FROM ASCAP AND BMI FOR TV MUSIC UNDER THE PRESENT SYSTEM. IS THAT SITUATION HELPFUL TO THE VAST PROPORTION OF COMPOSERS

REMAINING? WOULD THE UNKNOWN, STRUGGLING COMPOSER BE BETTER OR WORSE OFF UNDER THE PROPOSED LEGISLATION?

We know of no BMI composer out of the tens of thousands we represent who believes he or she would be better off if S. 1980 was enacted. The object of the bill is obvious. The thread runs throughout everyone of the proponents' statements. They hope to save money and the only place that money can come from is the pockets of writers and publishers.

As for the numbers that have been widely circulated and purport to show that the bulk of local television payment goes to only a few composers and publishers, they are, quite simply, extremely deceptive. BMI and ASCAP are required by consent decrees, to accept virtually anyone who wants to join. As a result, each of us has a large constituency who can best be described as hobbyists and whose few works are rarely - if ever - performed.

Even of those active songwriters, however, it should be remembered that only a few will ever enjoy conspicuous success. There is, after all, only limited room at the top. Of course, this is true in any field of endeavor and certainly in any creative field. As a concrete example, in England there is a Public Lending Right which - through a sampling system - provides registered authors with royalty-like payments based on the number of times their books circulate from public libraries. Of the 11,307 authors who were registered, last year, only 63 received maximum payment while 1650 - nearly 15% - received absolutely no payment.

If Congress is to be asked to legislate primarily in terms of how many people benefit from a particular business activity, then it must be pointed out that the number who benefit economically from television's use of the public airwaves is a minute fraction of the total U.S. population. There are, after all, fewer than 1,000 television stations in this country and, of those, the 600 largest are owned by just 160 companies.

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Responses to Questions from Senator DeConcini

IN ARGUING AGAINST S. 1980 YOU STATE THAT THIS BILL IS SIMPLY AN EFFORT BY ONE OF TWO PARTIES TO A JUDICIAL PROCEEDING TO GET CONGRESS TO OVERRULE A NEGATIVE JUDICIAL DECISION AND IN EFFECT GIVE THAT SIDE THE VICTORY IT WAS UNABLE TO LEGITIMATELY OBTAIN IN THE COURTS. WHAT IS WRONG WITH THAT? ISN'T IT INHERENT IN OUR CONSTITUTIONAL SYSTEM OF SEPARATION OF POWERS THAT IF AMERICANS DON'T AGREE WITH THE COURT'S INTERPRETATION OF THE LAW, THEY CAN PETITION CONGRESS TO CHANGE IT? IT SEEMS TO ME THAT MUCH OF THE LEGISLATION WE IN THE SENATE CONSIDER IS BECAUSE SOMEONE IS UNHAPPY WITH THE DECISIONS OF THE FEDERAL COURTS (HABEAS CORPUS, EXCLUSIONARY RULE, NFL BILL, DECONCINI-MOAKLEY [UNHAPPY WITH EXECUTIVE BRANCH.]).

BMI has no objection to the proponents' efforts to have Congress reverse a decision of the courts. We have made no claim that these decisions are - or should be - immune to legislative scrutiny. A basic tenet of our political system is clearly one of checks and balances.

Certainly we have frequently referred to the Court of Appeals decision in the Buffalo Case, but only for its factual conclusions. The following are some specific examples:

- a. The proponents' claim that serious efforts to obtain source licensing were always rebuffed was examined by

the court. It found that "notably absent from all of the correspondence tendered by the plaintiffs is the customary indicator of a buyers seriousness in attempting to make a purchase - an offer of a sum of money."

b. The court examined the proponents' claim that, since many producers own publishing companies who receive revenue from television performances ("kickbacks" was the term used before the subcommittee), the producers were disinclined to engage in source licensing. In its decision, the court found that "the undisputed evidence shows that these fees are far too small to persuade syndicators to refuse to undertake source licensing in the face of reasonable offers." (Emphasis added) Moreover, despite repeated testimony attempting to prove that the source licensing attempts had begun before the Buffalo Case and were not intended merely as a "paper trail", the Court found just the opposite. "Prior to bringing this lawsuit, the stations had not sought to obtain performing rights via source licensing."

c. The proponents have also made much of their claim to have been discouraged from attempting source licensing because they still would have had to pay their full blanket license fees. But, in fact, they had this right for 22 years and never used it.

As stated by the court, "The stations showed no interest in source licensing even during the period from 1950 to 1972 when the "carve-out" provision of the blanket license issued by BMI permitted a station to deduct from the revenue base of the blanket fee the revenue from programs for which music performing rights were cleared at the source, whether or not clearance was accomplished by licensing from BMI."

IN DISCUSSING ENFORCEMENT UNDER S. 1980, SENATOR GORE AND RALPH OMAN SAID THAT ENFORCEMENT WOULD BE DIFFICULT BECAUSE A COMPOSER OR SONGWRITER WOULD NOT KNOW WHEN HIS WORKS WERE BEING USED.

THIS ARGUMENT MEANS THAT SINCE WE CANNOT DETERMINE WHEN A TELEVISION STATION USES COPYRIGHTED MUSIC, THEN WE SHOULD MAKE ALL TELEVISION STATIONS PAY.

DOESN'T THE PRESENT SYSTEM REQUIRE THAT THE STATIONS WHICH USE VERY LITTLE MUSIC SUBSIDIZE THE STATIONS WHICH USE A LOT BY REQUIRING THE SAME PAYMENT FROM THEM BOTH?

We respectfully disagree with the premise that "since we cannot determine when a television station uses copyrighted music, then we should make all television stations pay.

First, as the Supreme Court observed in Broadcast Music, Inc. v CBS (eight justices voting to reverse), the burden is upon the user of a copyrighted work to obtain permission from the copyright holder before using it.

"Those who would use copyrighted music in public performance must secure consent from the copyright owner or be liable...."

Second, the present system is one which the broadcasters wanted, negotiated for and found fair. The following is from a letter dated October 4, 1985, signed by Leslie G. Arries and sent to all television broadcasters.

"We are pleased to enclose copies of the new form of BMI-local television station blanket license agreement which is the result of many months of negotiations between BMI and the All-Industry Television Station Music License Committee....We think it is a good agreement (emphasis added) and therefore strongly endorse it and urge that you execute and return it to BMI promptly."

We do not mean to imply, however, that because the proponents once preferred this particular form of license they must now always have it. If they have other suggestions, let them be put where they belong - on a bargaining table. And, if any issue cannot be resolved, let us take it to a rate court.

One cannot help but wonder why, if the present system is so "unfair", have the proponents consistently refused to submit their differences with BMI to a panel of impartial arbitrators.

DOESN'T THE BLANKET LICENSE SYSTEM CREATE A SIGNIFICANT BARRIER TO ENTRY FOR SMALL INDEPENDENT STATIONS, PARTICULARLY THOSE THAT SERVE A PARTICULAR, NARROW MARKET SUCH AS SPANISH LANGUAGE STATIONS? IF A SPANISH LANGUAGE STATION USES VERY LITTLE ASCAP OR BMI COPYRIGHTED MUSIC, WHY SHOULD THEY PAY FOR THE SAME LICENSE AS A STATION THAT RELIES ON AMERICAN PRODUCED SYNDICATED TELEVISION?

To begin with, the question implies an assumption that is contrary to fact. Neither BMI nor ASCAP licenses only music written in the United States.

Most of the world's nations with the notable exception of the Peoples Republic of China (with whom talks have begun) have music performing rights agreements with each other. Under these agreements, foreign originating music is treated as if it were domestic except that the fees are sent for distribution to the appropriate society in the country of origin.

BMI and ASCAP have, among others, reciprocal agreements with Spain, Portugal and every Latin American country except Cuba. The performance of such music in the U.S. without a license agreement would be illegal.

Of course, the station that uses little BMI-licensed music might benefit by using a per program agreement.

It should also be noted that the Confederation Internationale Des Societes D'Auteurs Et Compositeurs (the international organization representing 118 organizations in 60 countries) has just adopted the following resolution:

WHEREAS, the International Confederation of Societies of Authors and Composers (CISAC) recognizes the right of public performance of music on TV and all other media; and

WHEREAS, it would not be in the best interests of the international copyright community to limit or weaken such right and would be contrary to the policy of all members of CISAC;

"RESOLVED that the International Confederation of Societies of Authors and Composers (CISAC) does hereby express its opposition the proposed legislation (H.R. 3521/ S. 1980) before the United States Congress which would amend the U.S. Copyright Law to prohibit the conveyance of the right to perform publicly non-network

commercial syndicated television programs without conveying the right to perform accompanying music; and

RESOLVED that copies of these preambles and resolutions be sent to the respective subcommittees of the U.S. Congress considering such legislation."

* * *

Responses to Questions from Senator Mathias:

ANOTHER WITNESS BEFORE THE SUBCOMMITTEE, MR. VALENTINO, HAS SUBMITTED TESTIMONY STATING THAT HIS COMPANY IS THE MUSIC PUBLISHER FOR MUSIC IN THE SYNDICATED PROGRAM "LIFESTYLES OF THE RICH AND FAMOUS". HE STATES THAT DURING A RECENT PAYMENT PERIOD BMI PAID HIS COMPANY ONLY ABOUT 11 DOLLARS FOR THESE MUSIC PERFORMANCE RIGHTS ALTHOUGH THE PROGRAM WAS AIRED OVER 2000 TIMES DURING THAT PERIOD. COULD YOU EXPLAIN TO THE COMMITTEE WHY THE PUBLISHER, AND THE COMPOSER WOULD EACH RECEIVE ONLY AN 11 DOLLAR PAYMENT DURING THAT PERIOD?

Mr. Valentino's query was received by us on March 17, 1986. We replied on March 21st as follows:

"As you should be aware, because of the difficulty of identifying particular episodes of a series shown on a given television station, background music for syndicated television shows is paid by taking the average percentage of a particular affiliate's share of the total music used in all episodes of the program (or a representative sample) and paying the affiliate that percentage each quarter, regardless of whether the particular episodes in which the affiliate's music appeared were or were not shown during that quarter.

Our cue sheets show that RFT (Mr. Valentino's publishing firm) has a total of 21 seconds in 1 of the 29 episodes of the show, LIFESTYLES OF THE RICH AND FAMOUS, used in calculating payments for the quarter. The 2,313 performances indicated on your statement were certainly not performances of the one episode which contained your music. They were the total performances of all of the episodes of the show. Your share of all of the BMI background music used in the entire series was 1/100th of a minute. The \$11.81 which you were paid, therefore, represents 1/100th of our one minute rate times 2,313 - the aggregate number of times all LIFESTYLES episodes were used in the quarter.

This method of crediting background music in syndicated shows has been in use for many years and has been reflected on our statements for many years. This is the first time that you have queried it. You could have had an explanation of the statement at any time if it was not clear to you."

IS YOUR ORGANIZATION OPERATING UNDER A CONSENT DECREE SIMILAR TO THAT UNDER WHICH ASCAP OPERATES?

Yes, both BMI and ASCAP operate under consent decrees that are, in many respects, similar, but, in many other respects, are also different.

One major distinction is that the BMI decree does not provide for a court rate fixing procedure. The Department of Justice and, until recently, no user has ever requested such a mechanism because all licenses were successfully negotiated. Recently, the

All-Industry Radio Committee and the All-Industry Television Committee felt that they were unable to negotiate satisfactory agreements with us. At that time, BMI offered to submit all disputed matters to binding arbitration. Both committees rejected the offer.

Eventually, when the agreements were finally negotiated, BMI agreed to seek a modification of its consent decree to provide for a court rate fixing procedure similar to the one in the ASCAP decree. The television networks have made a similar request and BMI has already informed the Department of Justice that it is agreeable to such a modification.

ONLY A SMALL PERCENTAGE OF YOUR MEMBERSHIP RECEIVES ANY FUNDS FROM THE POOL OF MUSIC LICENSE FEES PAID BY BROADCAST TELEVISION STATIONS. COULD YOU EXPLAIN WHY?

A similar question was asked, in part, by Senator Spector. I respectfully refer you to page six of this document for our response.

THE PROPONENTS OF THIS LEGISLATION HAVE NOTED THAT A LARGE PERCENTAGE OF FEES PAID UNDER THE BLANKET LICENSE GO TO THE PRODUCERS OF THE TELEVISION PROGRAMS THROUGH MUSIC PUBLISHING SUBSIDIARIES. COULD YOU EXPLAIN TO THE COMMITTEE HOW THIS WORKS? WOULD PASSAGE OF S. 1980 REDUCE THE FEES PAID TO THESE MUSIC SUBSIDIARIES? WOULD IT AFFECT THE PAYMENTS RECEIVED BY COMPOSERS?

In our response, we wish also to note that many of these program producing companies are, in fact, owned by broadcast interests. Proponents of the bill have characterized the payments made to publishing firms owned by motion picture companies as "kickbacks". Under the circumstances, we rhetorically ask whether the payments made to broadcaster owned publishing companies are also "kickbacks"? And how about those motion picture companies who recently acquired broadcast interests (e.g. 20th Century Fox and MCA) are the "kickbacks" their publishing subsidiaries received now considered to be something more acceptable?

To reply to your question, however, the way the system generally works is that the music written for a TV show - especially theme or background - is done by composers hired by the producer. They are, however, not employees in the conventional sense and are considered to be independent contractors and thus retain all of their performing rights. The publisher of this specially written material is frequently a subsidiary of the producer.

The common practice throughout the world is for the writer to share his or her performing rights with a publisher in exchange for the services performed by that publisher. It is also a general world-wide rule that the publisher's share cannot exceed 50%, but it may be less. As composer, Mike Post, testified before the subcommittee, he also gets half of the publishing share so that, in this instance, the publisher only gets 25% of the total.

Insofar as how the publishers would be adversely affected by S. 1980, BMI would prefer to have them answer that question for themselves. The answer can be inferred, however, from the fact that composers would be seriously injured. Without a practical system of residual payments such as now provided by BMI and ASCAP, there would be only a one-time payment or a "buy-out" of the performing rights. Thus the writer who now gets only a few thousand dollars to write, arrange and, sometimes, conduct or

perform the composition, would have very little bargaining power and would have to accept little more than token payments for the unlimited rights to his or her music.

Mike Post who currently provides music for seven hours of prime time television put it quite simply and dramatically when he testified how disadvantaged he would be if he had to negotiate as an individual with a major producer. "They'd wash me and hang me out to dry!"

To compound the problem even further, only a percentage of music used on television is specially written for a particular program. A considerable amount of feature music is composed independently of the program and no contractual arrangement exists with the program producer or any publisher even remotely connected with him. Several very popular musical programs such as Hee Haw, The Lawrence Welk Program, American Bandstand and Solid Gold are excellent examples of syndicated programs that depend heavily on this feature music.

AREN'T BROADCASTERS WHO HAVE A BLANKET LICENSE PAYING FOR ACCESS TO A LOT OF MATERIAL THEY WILL NEVER USE? COULD YOU NOT LOWER THE PRICE BY ONLY LICENSING THE SPECIFIC MUSIC THEY WANT?

The simple answer - at least for BMI - is that until the Buffalo case, the television industry never concentrated on anything other than a blanket license. If they want some other license form, that is a subject for negotiation and not, we submit, drastic legislation which is contrary to a basic principle of American and international copyright law - continuous payment for continuous use.

A somewhat similar question was asked by Senator DeConcini and we respectfully direct your attention to our reply on page nine of this document.

ACCORDING TO YOUR TESTIMONY, COMPOSERS REPRESENTED BY YOUR ORGANIZATIONS STAND TO LOSE FINANCIALLY IF S. 1980 IS PASSED. WHAT ABOUT THE PUBLIC. HOW WILL PASSAGE OF THIS LEGISLATION AFFECT THE AVERAGE TV-WATCHING, MUSIC-LOVING CITIZEN?

In Fox Film Corp v. Doyal (286 U.S. 123, 127, 13 USPQ 243 244) Chief Justice Hughes said the following with respect to the copyright monopoly granted by Congress:

"The sole interest of the United States and primary object in conferring the monopoly lie in the general benefits derived by the public (emphasis added) from the labors of authors'. It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius."

The views of the creative community on this issue are already well known. Among those expressing opposition to S. 1980 have The Authors League and the National Music Council, an umbrella organization of more than 50 groups including the American Federation of Musicians, the American Symphony Orchestra League and the the National Federation of Music Clubs.

It seems absolutely clear to us that the proposed legislation cannot stimulate creativity and, by reducing the available rewards to creators, will tend to stifle it. If S. 1980 becomes law, producers will tend not to use special composed material, but, we believe, will opt for that which is already in the public domain or - although it's often ill fitting - music that is currently, and inexpensively available from production libraries.

If the composer is not induced to release "the products of his creative genius", then the general public who now benefits from the abundance of new creative works will be the ultimate loser.

* * *

RESPONSE FROM MIKE POST

Because Chairman Mathias and Senator Specter have asked me the same question, it seems clear that it is the pivotal one to ask about S. 1980: namely, will S. 1980 cause music composers to receive less for our work?

When I testified before the House Subcommittee on this matter, I heard Mr. Ralph Oman, the Register of Copyrights, describe the legislation by saying "If someone tells you it's the principle, and not the money ... its the money!" Local television station broadcasters are supporting this legislation because they believe this enactment into law will cause them to pay less for the music they use.

If that's right, then because S. 1980 would require composers to be paid at the source by program producers, then the only way composers are not going to lose money is if the producers pay more.

I appreciate your recognition that I am a successful music composer for television. But because I came up from the street in my business, I can also speak for the newcomers to it. With my success, I would give the producers a battle, but they would hang me out to dry. And if they can do that to me, the newcomers will really be hit.

Right now, I am already paid upfront by television show producers -- about \$3,000 - 4,000 per show. Almost all of that money is for arranging and recording the music based on union scale for that work. The money I make on the composition of the music really comes from repeated broadcasts of the shows. Because the shows are produced at a loss, in the hope of profits from the same repeated broadcasts, there is no way that producers are going to pay me the same amount I can get from repeated broadcasts upfront -- because they don't know if they are going to make any profit either!

You should know, by the way, that my upfront payment is also episode-by-episode, because the producers and I also have no way of knowing how many episodes there may be. Just as for the success of syndication, only the public determines what television pilots will succeed. I think you can make your own judgment about how newcomers will fare in this situation -- they will be paid as little as possible, and the public will suffer really mediocre music on television of the kind broadcasters have accused me of composing.

Senator MATHIAS. Thank you very much.
Mr. Thompson.

STATEMENT OF W. ROBERT THOMPSON

Mr. THOMPSON. Mr. Chairman and members of the committee, my name is Bob Thompson. I am the president of SESAC, Inc., which is America's third performing rights organization.

We were not involved in the Buffalo litigation with ASCAP and BMI, and I guess essentially a question arises if you did not have a dog in that fight, what are you doing in this hunt?

Well, to me, it is a matter of overriding public policy, and that is the primary reason why I am here.

The argument that the studios in Hollywood and the television industry are at loggerheads is an argument that has been propounded since 1949 at least. I do not think that is really the issue and I would like to put that in more specific terms.

Our company represents the Reverend Clarence Rivers, who is the foremost composer of contemporary liturgical music for the Catholic Church. Included in many syndicated programs. The Frederick Swann catalog of Chapel Hill, NC, likewise an outstanding catalog of Christian music: included in syndicated television programs.

We also represent Mosie Lister, the composer of one of the great classics of contemporary Christian music, "How Long Has It Been?" We represent the family of Albert E. Brumley from Powell, MO. Mr. Brumley was the composer of "I'll Fly Away." We also represent William Dawson of Tuskegee Institute, Alabama, the pre-eminent black choral writer known throughout the world.

These are the people that would be affected by this bill together with some of the others you have heard mentioned today.

One of the primary elements of our written statement, particularly the one submitted as a preliminary statement to the House of Representatives, dealt with what I consider to be probably the foremost concern for the future. If we are, in fact, the "think tank" of the world, then our intellectual property will have a value to this country's economy in the 21st century that makes it a transcendent responsibility, in my view, for Government to establish a public policy consistent with that reality.

In that regard, the New York Times on Monday, April 7, front page of the business section, indicated United States plans to defend its patents. This I think conclusively demonstrates that domestic only copyright legislation would indeed be bad for all parties concerned, including the television industry.

Thank you very much for the time.

[Submissions of Mr. Thompson follow:]

PREPARED STATEMENT OF W. ROBERT THOMPSON AND NICHOLAS ARCOMANO
ON BEHALF OF SESAC INC.

SUMMARY OF STATEMENT OF SESAC INC. IN OPPOSITION TO S. 1980

I. SESAC Background. SESAC, founded in 1930 to represent the rights of unrepresented European composers and authors, today represents over 2,000 songwriters and 1,000 music publishers, the overwhelming majority of whom are American.

II. S. 1980 Would Create A Privileged Class By Abandonning 300 Years of Copyright Protection. Since the Statute of Anne, copyright laws have required payment for the right to copy. The right of public performance is one expression of that principle. S. 1980 would exempt a small group of television broadcasters, who are the performers of music, from that 300 year old requirement. Broadcasters have always had the right to seek alternatives to the current system but have not sought those changes in the marketplace. Furthermore, in the twenty year process revising the Copyright Act, broadcasters never raised the issue of source licensing.

III. Television-Economics - Is Help Necessary? From 1978 to 1983 television revenues grew by 233%. From 1963 to 1983, the cumulative Consumer Price Index increased by only 228%. In five years, television revenue grew more than the CPI did in 20 years. Over the same time span, music licensing fees as a percentage of television revenue decreased. Fees grew as a result of the tremendous increases in television revenues. It is only fair that the creators of music share in the increased revenue of the user/performer of music. Groups of up to twelve stations own 649 of 922 (70%) of U.S. television stations. Certainly such groups singly or in unison possess sufficient power to seek alternatives to the blanket license in the marketplace.

IV. Judicial Decision And Dominoes: Who Should Bear The Burden To Persuade. Many courts have found the blanket license legal and reasonable over the course of a 16 year challenge to its legality. \$20 million which otherwise would have gone to songwriters has instead been spent on legal fees. These court cases established that the blanket license is used worldwide, is more efficient, cheaper and simpler than any other system and provides unlimited infringement free access to most of the music existing in the world today. Passage of S. 1980 would place an unconstitutional restriction on the right of a property owner to transfer his rights in the manner he chooses, solely for the benefit of 900 television broadcasters and not for the benefit of tens of thousands of songwriters worldwide or the public.

V. Moral Rights In the U.S. Of Tomorrow. S. 1980 would remove the U.S. from leadership in worldwide intellectual property protection by placing our law at variance with the copyright laws of the rest of the world. Erosion of copyright protection would remove the stimulus to creativity and result in the creation of fewer works. Finally, the broadcasters strongly support adherence to the Berne Convention, yet S. 1980 is directly contrary to the 100 year old principles of copyright embodied in that convention.

SESAC Inc. hereby expresses its appreciation to Senator Charles McC. Mathias, Chairman, and to all the members of the Subcommittee on Patents, Copyrights and Trademarks of the Committee on the Judiciary of the United States Senate for the opportunity to submit this statement in opposition to S. 1980

which would amend Title 17 of the U.S. Code. SESAC's initial statement concerning the companion bill, H.R. 3521 introduced in the House of Representatives, is attached for the record.

I

SESAC BACKGROUND

SESAC was founded in 1930 by Paul Heinecke, a German immigrant and American citizen possessed with both a love of music and keen business acumen. In his twenties, Mr. Heinecke had been the American Manager of Breitkopf and Hartel, the largest European publisher of music in the world. A man of vision, he accomplished his goal of licensing European and American music domestically. He paved the way for American performances of Sibelius' "Finlandia" and "Valse Triste," Ponce's "Estrellita" and Provost's "Intermezzo" as well as the music of modern composers such as Arnold Schoenberg and Frederick Delius. He formed SESAC to represent the unrepresented composer and author. SESAC continues to fulfill Mr. Heinecke's mission more than a half-century later by finding, developing and protecting the rights of creative talent out of the mainstream of contemporary music capitols.

In its early years, SESAC was known as the Society of European Stage Authors and Composers--that connotation was discontinued over 45 years ago as the SESAC repertory became overwhelmingly Americanized. The many accomplishments of Paul Heinecke are detailed in the Congressional Record at January 14, 1965.

II

S. 1980 WOULD CREATE A PRIVILEGED CLASS BY ABANDONING
300 YEARS OF COPYRIGHT PRINCIPLES

A fundamental principle of copyright since the Statute of Anne requires payment for the right to copy. The right of public performance, with its correlative right of continued payment for continued performance, is but another expression of that fundamental principle.

S. 1980 would exempt television broadcasters who, in fact, are the performers from paying creators of music for the continuing use through public performance of musical works. This exemption would be accomplished by shifting the responsibility for that payment for performance to the producers of audio-visual works.

It is claimed such a precedent already exists for motion picture theatres. This position by television interests is an attempt to retry the Buffalo Broadcasting case, which they LOST! First, the motion picture theatre issue is a result of judicial decision under anti-trust laws. Second, in 1948, at the time of the Alden-Rochelle decision, the Copyright Act of 1909 made the bundle of rights comprising copyright indivisible. Last, it is very doubtful that Alden-Rochelle has any application today given the free and unlimited divisibility of rights pursuant to the 1976 law.

Finally, as a result of Alden-Rochelle and the 1950 ASCAP amended consent decree, television broadcasters have had the right to seek out alternative licensing methods. That they have not done so is testimony to the efficiency and reasonable cost of blanket licenses issued by SESAC and its competitors. S. 1980 is simply bad law that has no redeeming characteristics other than

elevating the television broadcaster to a privileged class under the copyright law. We are compelled to point to the fact that the source licensing restriction on the manner in which a property right may be transferred was never raised by the broadcasters during the twenty years of studies of copyright problems and the extensive legislative hearings and deliberations that resulted in the revised Copyright Act of 1976. That fact alone speaks to the merits of the blanket licensing system.

III

TELEVISION ECONOMICS - IS HELP NECESSARY?

Television broadcasters enjoy revenues of more than 17 billion dollars annually. They need no help from government after receiving a license to broadcast. According to U.S. Department of Commerce figures, television revenues grew from 6.9 billion dollars in 1978 to 16.1 billion dollars in 1983, an unbelievable 233 percent increase in just five years.

According to the Consumer Price Division, U.S. Department of Labor, the Consumer Price Index rose 228 percent during the period 1963-1983. In short, television leap-frogged a twenty-year cumulative CPI increase in but five short years. It is very important to note that the cost of music licensing as a percentage of revenue has decreased over the same time span. Can anyone seriously doubt that these vast advertising expenditures did not work their way into higher consumer prices?

Music licensing fees for television have grown but the fact is they have grown more as a result of tremendous revenue leaps by the medium itself than through any new or added charges for music access. There is no economic crisis facing the television industry--far from it--and to subscribe to the theory of replacing blanket licensing by source licensing would only lead to more far-reaching inequities over the long term for creators, particularly those in the initial stages of their careers as composers and authors of music.

It is only fair, and certainly reasonable, that creators of music should be protected by an organized system of licensing which attempts to maintain the real purchasing power of their royalty payments and to reflect through the years the real market value of their music--a system which affords copyright owners a fair return for their creative work.

Is the television industry suggesting it alone should possess the power to maintain a constant value of its revenue stream? S. 1980 seems to stand for that proposition. Or, is it that having failed to exert monopsony power in the marketplace or cause it to occur through the courts, this governmentally created and licensed industry can only achieve its goals in a political context? The discussion of a free marketplace for music is historic in its every nuance. For television broadcasters to assert this Brave New World of music licensing as a free marketplace for composers seems rather to say, music composed in the television marketplace should be free! Doublespeak is one characterization which might apply to the naked assertions in support of S. 1980.

Composers and authors of music have all benefitted from the freedom in the marketplace of the blanket licensing system. New talents are emerging and have recently emerged and they are and will be well served through that system. It rewards them by continuing payment for continuing performances. It is a

democratic free-enterprise way of life in licensing performing rights. It provides a form of capital investment for the future creativity of music and its impact on the national and global economy must be recognized. The key is that the centralized system of blanket licensing by the performing rights organization is the most effective means of keeping the domestic and international music economy alive and well. Otherwise, to accommodate the broadcasters, where no accommodation is necessary, through the mandate of source licensing is to court chaos in the licensing marketplace both domestically and internationally.

Another viable and useful economic consideration is a counting of heads, so to speak. According to Television Factbook 1985, 895 licensed stations were operating, 158 groups owned 592 stations or 66 percent of the total. A group is two or more. Then came the deregulatory 12-12-12 ruling, raising the group ownership limit from 7 to 12 stations. In one year, again according to Television Factbook 1986, television stations on the air increased to 922. More dramatically, group ownership jumped to 649 stations, 70 percent of all stations, under the control of 164 groups. The obvious is now commonly recognizable--media concentration is rapidly expanding in television.

It hardly seems necessary to detail the numbers of composers, authors and publishers who share annually from television license revenues attributable to non-network syndicated programming. Just for the record, however, SESAC, which has no publisher affiliates among the major Hollywood film companies, allocated syndicated television royalties to 37 writers and 49 publishers in 1985, covering 356 uses, for which the performance total would be geometrically higher in number. Those figures showed greater participation by writers and publishers in 1985 over 1984, yet fewer uses. This data example while certainly not exhaustive, points out a fact of audio-visual music usage SESAC believes common to its two larger competitors as well; there is a constant rotation of author and publisher participants in television performance royalty distributions. That data demonstrates again the 100 year old genius of the blanket license which provides unlimited infringement-free access to the repertoires of the performing rights organizations.

As Madison stated in The Federalist No. 43 in support of exclusive rights for authors and inventors, "The public good fully coincides with the claims of individuals." Francis Bacon could have been describing the shared growth of creators and users alike to the ultimate public benefit under blanket licensing when he stated, "That which is most useful in practice, is most correct in theory." Blanket licensing strikes the balance in the marketplace between creators and users.

IV

JUDICIAL DECISIONS AND DOMINOES: WHO SHOULD BEAR THE BURDEN TO PERSUADE?

Suffice to say the Buffalo Broadcasting case has been analyzed, discussed, presented and dissected ad infinitum. However, it is but one case of a continuum which began in 1969 with CBS v. ASCAP and BMI. In the 16 years from the filing of the CBS case to the denial of certiorari by the Supreme Court in Buffalo Broadcasting in early 1985, the attack was the same, the issues were the same, the result sought was the same and the motive the same: destroy the blanket license and with it the only true equality of bargaining position for the creators. An estimated 20 million

dollars which should have gone to the creators of music, as envisioned by the Constitution and the Copyright Act, instead have been spent on legal fees in expensive civil litigation. Songwriters may very well wonder, what price victory?

S. 1980 is seductively simple! Provocative title: Copyright Reform! To mandate source licensing through this amendment is to dismantle and eventually destroy the economic structure of the copyright system, not to reform it!

The blanket license is perfectly legal. It performs a difficult function more efficiently and more inexpensively than any other method. It is universally used by every performing rights organization in the world for the best of reasons: it delivers two products simultaneously, complete and unfettered repertory access without regard to transfers of copyright ownership and complete freedom from claims for infringement. That is the service and product of any performing rights organization. Very few users, broadcast and non-broadcast, have music use patterns which are unchanging. The true genius of the blanket license is the total freedom to choose and use from the repertory.

You are now presented with a bill to effect major change in American Copyright Law, a fundamental move away from a principle of law, continuing payment for continuing use. The success of a syndicated television program assures the success of the creator of the music on that program through this principle. Blanket licensing works in the best interests of both the creator and the user. A change, if enacted, would begin an unbroken line to your doors seeking the simple reform of equal treatment. Immediately after enactment of S. 1980, it would seem logical for the television networks to come next, as Buffalo Broadcasting retraces itself to its genesis, CBS. However, even if there were no domino possibility here, it is time the proponents of draconian destruction of property rights bear the burden of truthful persuasion.

That burden can only be met by a fulsome and thorough tour of their Brave New World of music licensing. And, when finished--an answer to the ultimate question--if all this is so, why have you not used the economic resources at your disposal to accomplish it without tearing at the fabric of Copyright Law? The failure by television broadcasters to pay the sums of money to exercise alternative market choices now existing hardly provides a truthful foundation to support a need for what is being hailed as Copyright Reform! The reality is that this bill would provide the most highly regulated restriction on the transfer of a property right for the singular and express benefit of the television broadcast industry, not for the public good and certainly not for the good of the creator.

Y

MORAL RIGHTS OF AUTHORS IN THE UNITED STATES OF TOMORROW

S. 1980 is short-term thinking focused on a narrow special interest with domestic impact. The longer view, the more compelling analysis, should properly be focused on the moral rights of authorship in the 21st Century. The United States is no longer a member of UNESCO. That fact does not necessarily import any short-term legal problems with regard to international copyright protection under the Universal Copyright Convention. However, the uncertainty for the longer term is quite another matter.

If the United States is to continue as a dominant force in the world marketplace of ideas, it should do so as a major leader and contributor to the fairness and equality represented by the principle of moral rights of authors. This cannot be accomplished through piecemeal, special interest amendments to the copyright law. What we should be discussing is the necessary revision, as distinguished from so-called "reform," to bring the United States to a position of accession to the Berne Convention.

The year 1986 marks the 100th anniversary of the Berne Convention. Of incidental interest is the fact that the first Berne text was not very complex. It did, however, establish crucial principles still significant today: national treatment, right of translation and the right of public performance.

Any act of disincentive to the creative process, such as S. 1980, will further reduce the economic future of America. The copyright industries, of which television is a part, are the fastest growing sector of gross national product. A recent study for the American Copyright Council conducted by Michael R. Rubin concluded that, for the period 1980-1982, GNP rose by 16.6 percent, while copyright industries grew by 25.3 percent for the period. All of this outstanding performance was achieved with our present licensing structures and systems. What can we expect from the Brave New World proponents?

Several quotes from the report to the Legal and Legislation Committee of CISAC by Harvey Winter, Department of State, at Perugia, Italy, in May 1985, are extremely articulate in correctly framing the problems inherent in legislation of the S. 1980 type:

If copyright protection were to erode to the point where there was little or no protection, the greatest stimulus to creativity would wither away. It is difficult to conceive that any particular country--no matter what the level of its cultural or economic development--would wish this to happen.

The statutory forfeiture of the divisibility of an author's right of public performance can only be characterized as an erosion of copyright protection of a most extreme nature. There can be no future benefit to creators or the public interest from such a forfeiture.

Mr. Winter further describes what should be the shared American perception of intellectual property dimensions in the following manner:

What Americans see today is that copyright commerce is more international than ever; a film opening in a theatre in Buffalo, New York, is part of a chain of events stretching from Paris to Bangkok, involving television, cable, pay-TV, and home video markets, on all four continents. And, another example, a sound recording produced in New York City may be instantly pirated in the Far East and copies diffused throughout Europe, Latin America, and Africa. There are no longer national markets in copyright. It is a world market.

In such a milieu, firm and fair law protecting creative labor and investment is essential. And, it must be fought for. The basis from which to conduct that fight can only be one accepted by the widest communities of interest--user and proprietary. That basis is the Berne Convention.

Ironically, the motion picture industry and television broadcasters both, according to Mr. Winter, strongly support U.S. adherence to Berne. One cannot have it both ways. Special interest domestic legislation such as S. 1980 may prove conclusively fatal to America's international aspirations.

CONCLUSION

SESAC strongly opposes S. 1980/H.R. 3521 as constitutionally defective legislation contrary to the present and future public interest of the United States. It is narrow special interest legislation with domestic benefits only for the very privileged few holding FCC licenses and all to the detriment of the present and future creative processes in music. The future international impact of this eroding form of copyright legislation is, at best, uncertain; and at worst fatal to American aspirations in an international marketplace.

Finally, the proponents of this legislation cannot make their case in any way other than the cancellation of an author's rights and the shifting of a performance responsibility in a manner totally destructive of historic copyright principles.

American authors and composers of music, in the next century, will require strengthening of their rights in order that the public good may be served. The public good is always served by legal recognition of the moral right of the individual.

* * *

INITIAL STATEMENT BY SESAC, INC. A PERFORMING RIGHTS ORGANIZATION REGARDING H.R. 3521

SESAC, Inc. on its behalf, and on behalf of its affiliated authors and composers of music and music publishers, opposes the enactment of H.R. 3521 on the grounds that it is:

- *In derogation of an express Constitutional provision
- *Contrary to the best interests of the United States
- *Conspicuously narrow special interest legislation
- *Contrary to the future interests of its proponents
- *Proposed to circumvent judicial decision

The Bill, as drafted, contains prohibitory language in derogation of the exclusive right expressly granted to authors in Article I, Section 8 of the Constitution. This express Constitutional grant is carried forward as Section 106 of the Copyright Law. Enactment of H.R. 3521 would be contradictory to both the Constitution and the Copyright Law.

The Bill would effectuate a further erosion of copyright protection at a time when intellectual property rights, of which copyright is a part, have become the subject of intense study by the U.S. Trade Representative with regard to the present and future impact of such erosion on the overall economy of the United States. President Reagan addressed the issue directly on September 23, 1985, in an Administration Statement on International Trade Policy issued by the Office of the United States Trade Representative. On October 8, 1985, H.R. 3522, (The Trade Partnership Act of 1985) drafted to strengthen protection

of U.S. intellectual property was referred jointly to the Committee on Ways and Means, Finance and Urban Affairs, the Judiciary, and Energy and Commerce.

It is difficult to comprehend any rational and logical reconciliation of H.R. 3521 and these other Administration and Congressional initiatives. Any attempt to do so would further exacerbate present difficulties encountered by the United States in its efforts to expand intellectual property rights protection in international markets. The involvement of American society into a post-industrial information age society requires that we strengthen our internal protection of rights. We can hardly be effective in global marketplaces of intellectual property if we continue to erode domestic protection. We must put our house in order. Statesmanship will be required to accomplish such forward thinking goals.

The Bill would benefit, at most, some 800 television station owners at the expense of thousands of authors and copyright proprietors. It is a notorious example of a small special interest group seeking a government sanctioned economic benefit at the expense of a far larger group. Do local television stations, many owned by large conglomerates--and expanding their ownership due to recent deregulatory station ownership rules--require such a subsidy mandated by Government? A local independent Los Angeles television station, acquired in 1982 for slightly more than 200 million dollars, was sold within the past four months for a sum in excess of 500 million dollars.

Local television stations were subsidized by all three music performing rights organizations who granted gratis music licenses during the infancy of the television industry. This process also extended to FM radio during its launching years. These examples demonstrate clearly the responsible leadership of these organizations in recognizing the necessity for contribution to valuable future markets. Both television and FM radio are now fully mature industries. It is appropriate that they make a present and future contribution to the encouragement of authors and composers who will add their works to existing music repertoires.

A present example of government mandated subsidization is the compulsory license provision for cable television. While performing rights organizations presented argument against such compulsory provisions during the omnibus revision of the Copyright Act, it is now broadcast television, including the proponents of H.R. 3521, who seek to remove such compulsory license provisions, primarily on the grounds that cable is a mature industry. What better set of facts would identify a narrow special interest group? Governmental regulation to produce profits, deregulation to produce profits then, again, prohibitory regulation to now produce additional profits. And at each stage, profits obtained at the expense of a larger group and in opposition to the express public policy of the Constitution and the Copyright Law.

No one can predict shifting public taste and appetite for musical expression. Performing rights organizations have amassed, for more than a half century, the combined artistic output of the world's authors and composers. Television, like all other users, has at its command under a blanket license, access to this vast reservoir of cultural expression. Television would be greatly damaged, in the future, by enactment of H.R. 3521, which would be a detriment to the encouragement of expanding this reservoir to meet future public tastes and appetites.

The conclusive fact that the public policy wisdom of exclusive rights to authors serves the public interest is manifest in the world-wide love and acceptance of American music. It has been accomplished by the steady contributions to repertory pools under a system of compensation to authors that existed and flourished before the technology of television existed. Television benefits from it and now should continue to contribute to it as did technologies before them. That policy is in their present and future best interest.

In conclusion, SESAC opposes H.R. 3521 on the grounds that it would circumvent a judicial decision during which an extensive production and examination of all relevant evidence revealed that television broadcasters failed to carry the burden of persuasion that the present system either violated the antitrust laws of the United States or limited their ability to reduce their cost of music by alternative means. Television broadcasters' real desire is to take advantage of what others have placed at their disposal for use through more than a half century of fostering public policy. Television broadcasters do not want to make the capital investments necessary to seek alternatives. They sought, in the first instance, court imposed reduction in cost by litigation. Now, having failed, they seek legislative reduction in cost.

H.R. 3521 represents profits for television broadcasters through reduction in costs at the expense of public policy and the public interest. This effort comes forth at precisely the moment in time when public policy and the public interest requires strengthening, not erosion of, copyright protection. The express grant of rights contained in the Constitution, and in the Copyright Law, would be denigrated by H.R. 3521.

H.R. 3521 should be withdrawn from consideration.

SESAC SUPPLEMENTARY STATEMENT

SESAC would respectfully add the following material to supplement the testimony of its president, W. Robert Thompson, during the April 9, 1986, hearing on S.1980. This additional material is being submitted pursuant to the Chairman's decision to keep the record open.

In response to a question by Senator Kennedy, Mr. Thompson was able to touch only briefly on an issue SESAC now believes to be of great significance in considering S.1980. That issue should be properly defined as an inquiry into the manner by which television acquires--**AND PAYS FOR**--syndicated programming.

The focus of the broadcaster testimony, hence the rebuttal, has been on the Hollywood Studios and their product. Without any specific definition of "Hollywood Studios", we believe it fair to say that the main programming element being referred to is that body of syndicated programs known as off-network.

We submit that off-network programming is but the tip of the syndication iceberg! The attached Exhibit A is taken from Electronic Media. The question becomes: How much of this programming is supplied to television through barter and trade-out arrangements, and how much is bought for cash. It seems only fair that composers who are told they need not worry about continuing payment for continuing use, but from different sources that performing rights organizations, have the opportunity to know where the funds for such payments are to be found.

SESAC believes that the proponents of this legislation have raised far more questions than they have provided answers. The subcommittee, we respectfully submit, has a very legitimate interest in pursuing, through additional hearings, some exacting testimony on television program purchasing practices. Exhibit B is another demonstration of the scope of this unanswered question.

CAN THE BURDEN OF COMPOSER ROYALTIES BE SHIFTED TO PROGRAM PRODUCERS WHOSE PROGRAMS ARE NOT SOLD FOR CASH AND STILL PROTECT THE FUTURE INCOME OF COMPOSERS?

We do not have the answer. We think the creative community deserves one.

SESAC RESPONSE TO SUPPLEMENTARY QUESTIONS FROM SEN. MATHIAS

Q. Mr. Thompson, your organization is much smaller than either ASCAP or BMI. Could you explain how you negotiate with television stations for public performance of the music in your repertoire, and the type of arrangements you enter into.

A. SESAC has consistently maintained a licensing policy dealing with its licensees on a direct basis. This policy is due in some part to the fact that television stations went on the air on a staggered schedule as construction permits were issued. SESAC performance licenses, therefore, expire on a continual basis, and are renegotiated or extended on a continual basis. This general outline of the trade, or business, practices of the company coincides with general legal considerations. In that respect, our generally recognized 5% market share dictates that SESAC licensing practices be formulated to provide some degree of equality of bargaining position vis a vis television stations. I respectfully direct the chairman's attention to the last full paragraph on page 3. of our prepared statement. The ever increasing scope of media concentration is of great concern to SESAC with regard to its continuing ability to offer viable and competitive opportunities to authors and composers of music.

SESAC television performance licenses are typically for a term of five years, subject to automatic renewals for like periods. The license agreements also provide mutual termination rights. SESAC licenses are not based upon either gross or adjusted gross revenue considerations. License fee determinants are city of license and highest 30-second spot rate. SESAC, therefore, has a grid schedule of rates for stations of similar circumstances, which are licensed in a consistent manner. A sample television station license, together with a fee schedule, is attached hereto, as Exhibit A.

The license form attached has, with some relatively minor changes, been in use by SESAC for at least 35 years. Television stations have found generally that the license agreement, rates and procedures fairly reflect the diversity, scope and value of the SESAC repertory regardless of the station's format.

Q. Is your organization operating under a consent decree similar to the ASCAP decree? Do you believe that absent such a decree your organization has an unfair advantage in negotiations with television stations?

A. Assuming, Mr. Chairman, that your use of the word "operating" means that SESAC was, in some way, charged by the Justice Department with antitrust violations which resulted in a consent decree, the answer would be no. However, using the word "operating" to apply, in a general sense, to our business activities, the answer would be that SESAC has consistently tracked those elements of both the ASCAP and BMI consent decrees which it thought applicable to music licensing in general. SESAC does not discriminate in its licensing practices, for example.

SESAC maintains a more selective affiliation procedure. SESAC, as the only privately owned organization in the world, and with its small relative market share, the aforementioned 5%, must at all times affiliate composers and authors with the view of maintaining breadth and diversity of repertoire. That policy has allowed SESAC to find, develop and expand the creative contributions of authors in Provo, Utah; Tuskegee Institute, Ala.; Omaha, Neb.; London, England; Seattle, Wash.; Powell, Mo.; Chicago, Ill.; Durham, N.C.; Baton Rouge, La. and Detroit, Mich. Authors from those cities, far removed from the film capitols of

the world, have made contributions to film music usage within the past year. **FILM USAGE SEEN ON TELEVISION THROUGH SYNDICATED PROGRAMMING.**

It is interesting to note here, parenthetically, that it is the open door requirement of the ASCAP and BMI decrees that provides a basis for the statistical arguments being advanced by the proponents of S. 1980, that only a minute fraction of affiliated composers receive performance distributions from television usage. We reiterate the statistical argument is falsely premised.

As to the second clause of the question, SESAC cannot conceive a scenario that would provide it an advantage over television stations, unfair or otherwise. SESAC does not, nor has it ever, possessed monopoly power in the relevant market that would give rise to a need for a consent decree. Fiscal 1986 gross revenues from SESAC music performance licenses approximate **six million dollars**. Television license revenue, as a percentage of that total, we must estimate on a pro forma basis to be **two million dollars**! That sum probably does not equal the legal fees paid by the television all-industry committee.

Television revenue must be estimated on a pro forma basis due to the fact SESAC is presently in the process of cancellation and issuance of new television licenses, previously identified as Exhibit A hereto. This process, which began in 1983, was held in abeyance during the pendency of the Buffalo appeal and, therefore, was not completed during fiscal 1986. (SESAC fiscal year ends March 31). Issuing new licenses to the television industry will not be completed until sometime in fiscal 1989.

The bottom line of the anticipated effect of S.1980 on SESAC is demonstrably more severe than its effect on ASCAP or BMI. A loss of two million dollars in revenue, measured in terms of its contribution to overhead, would--at the least--impair SESAC's ability to compete, and--at worst--bring its continued viability into question.

The continuing role of SESAC as a stabilizing force within the industry is--in our judgment--of great benefit to the public, to our competitors and most assuredly to music performance rights licensees--especially television broadcasters.

SESAC--operating as a free enterprise company, unfettered by government control through a consent decree--is, in and of itself, a viable marketplace alternative.

In conclusion, Mr. Chairman, given the facts as presented, the people of SESAC consider their only advantage being the tremendous challenge of remaining viably competitive with its available economic resources. That challenge is best kept alive with the least government intervention. The passage of S.1980, a bill to specifically regulate--by statute--the only manner by which SESAC can do business is to grant television an unfair advantage which it might well not be able to overcome.

EXHIBIT A

SESAC Broadcasting Performance License for TV Stations

AGREEMENT made this day of, 19 .., in New York, NY between

Business Address

(hereinafter called LICENSEE), and SESAC INC., a New York Corporation, having its principal office at 10 Columbus Circle, New York, NY 10019 (hereinafter called LICENSOR).

LICENSOR has entered into agreements with writers, publishers and organizations, whereby performance rights vested in, and/or controlled by said writers, publishers and organizations, have been assigned to LICENSOR for varying periods.

LICENSOR is empowered to authorize, license, prohibit, supervise and control performances of musical compositions.

LICENSEE is engaged in television broadcasting over station(s) licensed by the Federal Communications Commission as follows:

TV Station Call Letters

Location

Highest Thirty-Second Spot Rate

The parties hereto mutually agree as follows:

1. (a) LICENSEE hereby agrees to pay to LICENSOR for this license an annual fee of

which shall be payable in advance in twelve equal monthly installments of

on the FIRST day of each month, for the duration of this agreement.

(b) During any contract year, either during the initial or renewal term hereof, should LICENSEE's highest thirty-second spot rate differ from that factor in effect upon the execution of this agreement, LICENSEE's annual fee shall be adjusted in accordance with LICENSOR's schedule of fees for LICENSEE's market classification in effect as of the first day of said subsequent contract year. In the event of more than one change in LICENSEE's thirty-second spot rate during any contract year, the last change during said contract year shall govern LICENSEE's fee for the next ensuing contract year. Should an increase in LICENSEE's fee result from a change in LICENSOR's schedule of fees, LICENSEE shall have the right to terminate this agreement effective as of the date of such increase, provided that written notice of termination by Certified Mail is given to LICENSOR within thirty (30) days after written notice of such increase is sent to LICENSEE by Certified Mail.

2. This agreement is to be and remain in full force and effect for a license period of five (5) years from 19 .., to 19 .., except that in the event that commercial operation of LICENSEE's television station shall not commence until a date later than the commencement date specified above in this Paragraph, then the period of this contract shall be deemed to commence on the first of the month following the date when commercial operation of the station shall begin and shall continue for a period of five (5) years from such later date.

If commercial operation of said station shall not have begun at the commencement date first above specified in this Paragraph, LICENSEE shall give written notice to LICENSOR of the actual date of commencement of commercial operation of the station, by United States Certified Mail within ten (10) days after the date such commercial operation begins and upon failure of LICENSEE to so notify LICENSOR, LICENSEE agrees to make payments hereunder at the rate specified in Paragraph 1 from the commencement date first above specified in this Paragraph and for a period of five (5) years thereafter.

This contract will automatically continue in force upon all of the terms and conditions contained herein for successive five (5) year periods following completion of the first five (5) year period of this contract; provided, however, that either party may cancel and terminate this agreement on and as of the end of the first five (5) year contract period, or on and as of the end of any subsequent five (5) year renewal period, by giving to the other party by United States Certified Mail, written notice of intention to do so, at least ninety (90) days prior to the date upon which any said cancellation shall become effective.

3. LICENSOR grants and makes available to LICENSEE and LICENSEE accepts, a non-exclusive license and right to publicly perform only by television broadcasting from the television station(s) mentioned hereinabove, whether hereinafter known by said call letters or any other call letters (excluding FM, AM and/or any experimental station of any kind), such non-dramatic musical compositions as LICENSOR may, during the period hereof, have the right to license.

4. LICENSEE hereby agrees to furnish to LICENSOR, upon request, copies of its program records, logs, and all other records relating to the musical compositions performed on said station(s).

5. LICENSEE reserves the right to restrict or prohibit from time to time, in good faith, the performance of any musical composition granted under Paragraph three (3) as to which any infringement action has been instituted or threatened on a claim that such composition infringes a composition not included in LICENSOR's repertory or LICENSOR has been notified that a claim has been made by a non-SESAC affiliated publisher or writer that LICENSOR does not have the right to license the performance rights in such composition. LICENSOR shall provide reasonable written notice to the LICENSEE of the exercise of such right.

6. In the event that LICENSEE is in arrears for any one or more monthly payments, as stipulated herein, for more than 30 days, or has breached any of the other terms of this agreement, or in the event that LICENSEE is adjudicated bankrupt, or is declared or becomes insolvent, LICENSOR may in any of said events at its election cancel this license.

7. Nothing herein contained shall be construed as permitting LICENSEE to grant to others the right to broadcast, televise, reproduce or perform publicly for profit or otherwise, by any means, medium, method or process whatsoever, any of the musical compositions referred to above, or as permitting any receiver of the broadcast of any musical compositions to rebroadcast, televise, perform or reproduce the same for profit or otherwise, by any means, medium, method or process whatsoever, without first obtaining a written license from LICENSOR. LICENSEE shall have no right to perform or otherwise utilize any musical compositions covered under this agreement except as herein specified.

8. This license contract has been read and is understood by both parties and contains the whole agreement of the parties. There are no representations, promises or covenants other than those contained herein. No waiver or modification of this agreement shall be valid unless contained in a writing specifically referring to this agreement and stating that it is a modification or waiver and executed by one of the officers of the LICENSOR referred to below. No waiver of any breach of this contract shall be deemed a waiver of any subsequent breach of like or similar nature.

9. This agreement shall be construed in accordance with the laws of the State of New York and with applicable Federal laws.

10. This agreement shall not be valid unless executed in the name of LICENSOR by either its President, Vice-President, Treasurer, or authorized signatory, and shall be binding upon and insure to the benefit of the respective legal representatives or successors and assigns of all parties hereto, but no assignment shall relieve the parties hereto of their respective obligations hereunder.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be duly signed and sealed in triplicate as of the day and year first above written.

LICENSEE SIGN
ALL COPIES



EXHIBIT A
Page twoSESAC'S SCHEDULE OF ANNUAL PERFORMANCE LICENSE
FEES FOR COMMERCIAL TELEVISION STATIONS

Depending upon the station's market and its highest 20-second spot rate as it is printed in TELEVISION RATES AND DATA, the following schedule of annual fees will apply.
Market classifications are divided into eight (8) categories:

Highest 20-Second Spot Rate	Market H	Market G	Market F	Market E	Market D	Market C	Market B	Market A
\$ 00.00 through 24.99	\$ 600.00	\$ 630.00	\$ 660.00	\$ 690.00	\$ 720.00	\$ 750.00	\$ 780.00	\$ 810.00
25.00 through 49.99	630.00	660.00	690.00	720.00	750.00	780.00	810.00	840.00
50.00 through 74.99	660.00	690.00	720.00	750.00	780.00	810.00	840.00	870.00
75.00 through 99.99	690.00	720.00	750.00	780.00	810.00	840.00	870.00	900.00
100.00 through 124.99	720.00	750.00	780.00	810.00	840.00	870.00	900.00	930.00
125.00 through 149.99	750.00	780.00	810.00	840.00	870.00	900.00	930.00	960.00
150.00 through 174.99	780.00	810.00	840.00	870.00	900.00	930.00	960.00	990.00
175.00 through 199.99	810.00	840.00	870.00	900.00	930.00	960.00	990.00	1,020.00
200.00 through 249.99	840.00	870.00	900.00	930.00	960.00	990.00	1,020.00	1,050.00
250.00 through 299.99	870.00	900.00	930.00	960.00	990.00	1,020.00	1,050.00	1,080.00
300.00 through 399.99	900.00	930.00	960.00	990.00	1,020.00	1,050.00	1,080.00	1,100.00
400.00 through 499.99	930.00	960.00	990.00	1,020.00	1,050.00	1,080.00	1,100.00	1,150.00
500.00 through 599.99	960.00	990.00	1,020.00	1,050.00	1,080.00	1,100.00	1,150.00	1,200.00
600.00 through 699.99	990.00	1,020.00	1,050.00	1,080.00	1,100.00	1,150.00	1,200.00	1,250.00
700.00 through 799.99	1,020.00	1,050.00	1,080.00	1,100.00	1,150.00	1,200.00	1,250.00	1,300.00
800.00 through 899.99	1,050.00	1,080.00	1,100.00	1,150.00	1,200.00	1,250.00	1,300.00	1,350.00
900.00 through 999.99	1,080.00	1,100.00	1,150.00	1,200.00	1,250.00	1,300.00	1,350.00	1,400.00
1,000.00 through 1,499.99	1,500.00	1,600.00	1,700.00	1,800.00	1,900.00	2,000.00	2,100.00	2,200.00
1,500.00 through 1,999.99	1,800.00	2,100.00	2,400.00	2,700.00	3,000.00	3,300.00	3,600.00	3,900.00
2,000.00 through 2,499.99	2,100.00	2,400.00	2,700.00	3,000.00	3,300.00	3,600.00	3,900.00	4,200.00
2,500.00 through 2,999.99	2,400.00	2,700.00	3,000.00	3,300.00	3,600.00	3,900.00	4,200.00	4,500.00
3,000.00 through 3,499.99	2,700.00	3,000.00	3,300.00	3,600.00	3,900.00	4,200.00	4,500.00	4,800.00
3,500.00 through 3,999.99	3,000.00	3,300.00	3,600.00	3,900.00	4,200.00	4,500.00	4,800.00	5,100.00
4,000.00 through 4,999.99	3,300.00	3,600.00	3,900.00	4,200.00	4,500.00	4,800.00	5,100.00	5,400.00
5,000.00 through 5,999.99	3,600.00	3,900.00	4,200.00	4,500.00	4,800.00	5,100.00	5,400.00	5,700.00
6,000.00 and Over	4,200.00	4,800.00	5,400.00	6,000.00	6,600.00	7,200.00	7,800.00	8,400.00

The above Schedule does not apply to "GRAND RIGHTS" such as, but not limited to: dramatic renditions in whole or in part, with or without costume of dramatic-musical and dramatic works owned or controlled by SESAC, e.g., dramas, plays, operas, operettas, revues, musical comedies, sketches and like productions, and also all renditions of cantatas, oratorios, symphonic orchestra works (with or without solo voices or chorus). Terms for "GRAND RIGHTS" performances fees and rental fees for material are available upon request.

Applications from per-piece users with full particulars must be received sufficiently in advance of date of each performance. Upon receipt of application, SESAC will issue Performance License together with Price Quotation. All payments must be made in advance of performance.

January 1 1983

Bob Thompson FYI

EXHIBIT A

ELECTRONIC MEDIA JANUARY 13, 1985

Leading syndicated programs

Nielsen Cassandra rankings for November 1985 sweeps

First-run strips

Rank	Program	Weighted rating	Coverage of U.S.	National rating	Markets
1.	Wheel of Fortune	18.5	99.1%	18.3	192
2.	Jeopardy	11.2	94.5%	10.6	169
3.	The New Newlywed Game	8.9	90.7%	8.1	156
4.	Entertainment Tonight	8.4	89.9%	7.6	141
5.	People's Court	7.8	94.1%	7.3	162
6.	Donahue	6.2	97.5%	6.0	178
7.	The Price Is Right	7.8	87.0%	5.2	112
8.	PM Magazine	6.6	56.0%	4.9	53
9.	Divorce Court	4.6	84.1%	3.9	126
10.	Hour Magazine	4.9	78.4%	3.8	114

Off-network strips

Rank	Program	Weighted rating	Coverage of U.S.	National rating	Markets
1.	M*A*S*H	12.1	91.5%	8.4	155
2.	Three's Company	8.8	86.5%	7.1	151
3.	Different Strokes	7.1	91.1%	6.1	141
4.	Too Close for Comfort	6.9	74.0%	5.1	85
5.	Benson	7.0	71.6%	5.9	118
6.	The Jeffersons	6.5	76.3%	3.9	118
7.	WKRP in Cincinnati	6.5	86.2%	3.8	102
8.	Barney Miller	5.4	66.6%	3.6	98
9.	Gimme a Break	5.8	48.3%	3.2	55
10.	Taxi	5.2	66.8%	3.0	83

First-run weekly series

Rank	Program	Weighted rating	Coverage of U.S.	National rating	Markets
1.	Hee-Haw	7.2	79.5%	5.7	170
2.	Fame	6.3	89.7%	5.7	141
3.	Small Wonder	7.4	67.6%	5.0	60
4.	Solid Gold	4.7	96.8%	4.5	183
5.	Star Search	4.9	90.7%	4.4	159
6.	Lifestyles of the Rich & Famous	4.7	89.9%	4.2	157
7.	Dance Fever	5.0	79.1%	4.0	104
8.	What's Happening Now	5.1	74.3%	3.8	82
9.	Puttin' On the Hits	4.5	85.2%	3.8	131
10.	Entertainment This Week	4.2	83.2%	3.3	136

Animated programs

Rank	Program	Weighted rating	Coverage of U.S.	National rating	Markets
1.	Transformers	4.0	89.4%	3.6	131
2.	ThunderCats	4.0	85.2%	3.4	109
3.	G.I. Joe	4.0	84.9%	3.4	115
4.	He-Man	3.5	81.5%	2.9	111
5.	She-Ra	3.4	82.7%	2.8	110
6.	Scooby-Doo	2.9	84.5%	2.5	125
7.	MASK	2.7	72.3%	2.0	69
	GoBots	2.6	75.8%	2.0	89
9.	The Jetsons	2.5	71.1%	1.8	80
10.	Tom and Jerry	2.5	64.7%	1.6	73
	The Flintstones	2.3	70.8%	1.6	87

Barter—the program tool

EXHIBIT B

I wouldn't be NATPE without another round of the cash-versus-barter fights, and the session entitled, "Barter—The Program Tool," featured a discussion that moderator George Back predicted would continue "for the life of television."

Panelists discussed the pros and cons of barter in today's marketplace, the influx of split 30's on the television scene, "consideration" spots at the end of syndicated shows, and the look of barter in the future.

David Braun of General Foods said that barter-syndicated programs tend to be broadly distributed, and that General Foods sees them as a substitute for network television. In deciding to use barter syndication, he said, the company looks for the broadest market coverage, good ratings potential, significant efficiencies of adver-

tising relative to network, guarantees of efficiency, long-term price protection, multiple year arrangements, and good syndicators with good reputations.

"Network television covers all of the country, and we want a substitute," Braun said, adding that since General Foods doesn't take risks on programming, but on its own products, that barter syndication's guaranteed CPM's were valuable.

Dick Robertson, of Lorimar-Telepictures said that with the networks taking pot shots at syndicators, he was concerned about the financial infrastructure of the barter process. "Station people are largely unaware of where the money comes from," he said.

Among the factors affecting barter syndication, Robertson listed the fact that the networks had 31,618 more units of

advertising time to sell in 1984 versus 1980; the growth in numbers of independent stations, which had an effect on the spot market; split 30's, which he said soften both network and spot markets; increasing cable advertising revenues; and network regional feeds, which have been going on for years and continue to compete directly with stations in the spot area.

On the up side of barter syndication, Dennis Gillespie, of Viacom Enterprises, said that one fundamental truth remains: barter has stimulated enormous competition in the syndication marketplace.

"The problem with barter is that it's very hard to talk about it as one subject; it just depends on where it fits," said Joe Dimino, Storer Broadcasting. Dimino explained that while barter syndication does stations a lot of good on weekends, it has no place in prime access. "You don't need barter to make shows happen," he said. "I would support barter in prime access if all stations could compete fairly in that area, but most of us are powerless to program our 7:30 timeslots without barter," he added.

Gary Scollard, NMT Sales, said that "barter is here to stay, and it, in fact, maturing in a way." He made the point that "networks are the kings of barter," because they take most of the advertising time out of programming. □



Back, Braun, Robertson, Gillespie, Dimino, Scollard

Senator MATHIAS. Thank you very much, Mr. Thompson.

Senator Hatch, do you have any questions?

Senator HATCH. Thank you. I do have a few.

Let me start with you, Mr. Post.

If you were provided a reasonable offer by a TV producer for a source license or even a reasonable offer by a broadcaster for a direct license, would you automatically reject that offer, or would you consider it seriously?

Mr. Post. Well, I will be very honest with you. I was asked a similar question when I testified before the House, and it is such a far-out idea, I was not even sure what I was being asked. It is so counter to the way—

Senator HATCH. Have you ever had such an offer before?

Mr. Post. Oh, never, sir.

And I thought about it, since I was asked the question. And, of course, I am a businessman to some extent. Actually, I am supposed to be purely creative, but I want to get paid for what I do. So if someone came to me and said, listen, we are going to pay you a whole bunch of money for this piece of music, I would have to listen. Nothing like that has ever happened. But I would definitely entertain an offer, yes, sir.

Senator HATCH. As I understand it, you are free to either join or not to join BMI, ASCAP or SESAC.

Mr. Post. That is correct. It is an open-door policy.

Senator HATCH. Why have you chosen to join these music organizations rather than just negotiate on your own?

Mr. Post. Because if I was the greatest negotiator in the world, there is no chance of me ever negotiating with all these people at one time, number one.

Number two, no way to police them. And this is a system that works perfectly for me at this point in my career. And I must add that it worked perfectly for me 20 years ago when I was not doing near as well as I am now.

Senator HATCH. We have heard that local composers are somewhat harmed or may be harmed by blanket licenses.

My understanding, however, is that any local composer who writes for a local TV station or otherwise and is a member of BMI, ASCAP, SESAC, which, as I understand it, you are making a point is a routine situation.

Mr. Post. Yes, sir.

Senator HATCH. Would be paid under the blanket license.

Mr. Post. Indeed.

Senator HATCH. If that is so, do you see how the current negotiating system could harm local composers?

Mr. Post. No, sir. It is just a misrepresentation of what I know to be the facts and what I know to be the way that our business really works.

It kind of sounds good if you start with a false premise. But most local TV stations that I know about buy packages from composers other than guys like myself that are involved in doing network television.

So their argument, I do not understand it. It does not jive with what I know to be the real case.

Senator HATCH. Let me go to Mr. Cramer, Mr. Thompson, and Mr. David.

Opponents of the legislation have been very critical about the operation of the so-called ratemaking court in New York that supervises the ASCAP consent decree. They have told me that the court is ineffective because it has never really rendered upon a rate in all its years of operation.

What is your view on this?

Mr. CRAMER. Well, I would like to defer to Mr. David, but it seems to me because the broadcasters have insisted that BMI agree to that rate fixing proceeding, that is a condition of the negotiations that we entered into less than a year ago. They wanted it.

Now, if it was not effective, ask them why they insisted upon it, both in television and in radio. But the actual experience is Mr. David's at ASCAP, not ours.

Mr. DAVID. Well, we have, over the years—the last 40 years—negotiated every contract with every user of music. The Register of Copyrights mentioned earlier that the court seems to hover over us like a brooding presence. We have never had an adjudication from the court. We have always negotiated.

Now, the present rate proceeding, which is going to come before the court, I think, October 27 of this year, the court just came down with that date just recently, and I would assume if this legislation finds itself not going anywhere, that there will be a negotiation before that, and there probably will be a deal. And if there is not a deal, if we cannot make a deal, we have the burden of proof before the court, Senator. I mean that is implicit in the consent decree. We must prove that the rate we are seeking is reasonable.

If I may, Mr. Cramer reminds me, and I thank him, the last negotiations the court mentions, in its Final Order, the court recites that agreement was reached "after numerous hearings and conferences with the court and lengthy negotiations between the parties and with the aid of the court, upon forms of license agreement commencing January 1, 1968, and on a basis of payment for January, 1962, through December 31, 1967." The order recites the lengthy negotiations which wound up with this agreement.

The court was there to move us along, to push us along, and to see that nobody upset the balance and that the equilibrium, as Mr. Oman suggested, remain correct.

Senator HATCH. The court has played a role in what you are saying.

Mr. DAVID. Has played a role, but up to this moment has played a role in just keeping us moving along, has never had to make a decision. We were able to always come to an agreement.

Senator HATCH. You have been able to negotiate out of your problems?

Mr. DAVID. Yes.

Senator HATCH. My time is up.

Senator MATHIAS. Senator Kennedy.

Senator KENNEDY. I think it might be somewhat understandable now that you would not have solicitation since they have the blanket agreements at the present time. So I suppose the broadcasters would say why should we make a deal because we are going to get his music under the existing blanket license.

But, if this legislation were to pass, why do you believe that you would be not as well off as you are under the current system?

Mr. POST. Well, when I heard the figures quoted about "Magnum, P.I.," maybe I will be better off. I do not know.

I know that new composers would not be better off. I know that 20 years ago, I would not have stood a chance. You know, it is simple. The Government says that composers are not to start a union on one hand. Well, we have something that is not a union, it is a free way to go between these three societies and collect money now.

Now there is a bill in front of us that says, no, let us wipe all that out. Believe me that is what would happen. I mean they are only talking about local TV stations right now. That is baloney. You would see the end of these three societies very fast.

So the composer would be left having to negotiate one on one with the producers. With all due respect to the producers that are seated here, we are talking about sharks. [Laughter.]

We are certainly talking about extremely astute negotiators. Honestly, there would be no protection for a new composer, none.

Mr. DAVID. May I add something to that, Senator?

The implication that they effectively have no other alternatives because they have already paid for a blanket license is incorrect. They have a per program license which we offer at ASCAP, a per program license where they would just pay for the music on the programs they use; it would not be the blanket license. That is an alternative they have.

They had—I can speak and Mr. Cramer can add to it—a carve-out provision in Mr. Cramer's (BMI) contract that the broadcasters asked to have eliminated. So they have always had that.

Now, I have been in this business 40 years, and I know how this business operates. If these stations really wanted a source license, they could have it very simply.

The one thing they have never offered anybody is money. They have never offered a writer a dime, much less \$100. They have never offered anybody any real money, whether they are talking to producers or anyone.

All they had to do, if they want to pay for it, is to make agreements with the producers, with the writers, with the publishers, and set those agreements 1 year down the line, or 1½ years down the line. As their blanket licensing contracts expired, and they would be in the source licensing business. But that is not what they want. They want music for nothing.

Senator KENNEDY. Finally, are there any additional protections which exist under the current system which are important for the creative composers?

Mr. THOMPSON. Senator, if I might, I would like to address that for a moment.

Senator KENNEDY. That would not exist if the legislation were to pass.

Mr. THOMPSON. I understand the question.

One of the things that gravely concerns me, having represented the estate of Otis Redding as a private practitioner for a number of years, is the fact a significant part of the television syndication business is barter.

Now, if I am looking for compensation for the use of Mr. Redding's music in a syndicated program, does someone say to me you have two 30-second spots in Buffalo and you have one in Waco, TX? I mean these are elements that are definitely part of this picture under the present circumstance.

Senator MATHIAS. You are suggesting then his estate then loses any value in that intellectual property?

Mr. THOMPSON. Absolutely correct, to the extent that the estate might be put into a posture of conversion of some in-kind transfer back to cash, which it may or may not ever be able to accomplish. That is a single example.

Mr. CRAMER. I would just like to add to that, which is also in response to a question that the chairman asked earlier about the international implications of this.

I think it would be hypocritical if we pass this bill. Because as Mr. Thompson alluded to earlier, we are now seeking greater protection in the international world for American trademarks and copyrights. To do so on the international level and, say, protect American copyrights in Taiwan, where here in the United States we are diluting American copyrights, is hypocritical.

We cannot, under this legislation, protect the writer. The writer cannot protect himself abroad. This will result in reciprocal treatment from abroad. American writers and composers will suffer immeasurably from the loss of income.

As we are meeting here, Senator, there is a meeting—members of the panel—there is a meeting of representatives of 60 countries being held in Montreal who are very concerned, meetings of the leading countries of the world are very concerned about the impact of this legislation.

Mr. DAVID. May I make a comment?

Senator MATHIAS. Please.

Mr. DAVID. Something was said earlier in the day that related to a work of mine. Congressman Boucher mentioned that the source licensing approach worked so well on films, and he mentioned three particular works: the themes from "Star Wars," I think from "Sting" and "Butch Cassidy and the Sundance Kid."

The theme from "Butch Cassidy and the Sundance Kid" is "Raindrops Keep Falling on My Head," a song I collaborated on with Burt Bacharach. It was 1969, and my payment for that as a lyricist was \$7,500. That was the source licensing fee from the film.

If there were no blanket licensing system in place at that time, if I was not compensated for the times that music was played on television, radio and other aspects, if I was not compensated for the film, and theater use of my music all over the world except for the United States, I would have had \$7,500 and maybe that would draw me another \$1,000, \$8,500. And I submit this is one of the most popular songs in the last 20 or 30 years. And I am pleased to have had a part in it.

And if that is all I could have made, I submit I could not have sent—I have two sons I sent through college, I pay mortgages like everybody, I could not have made a career out of writing songs. I would have to have made it an avocation. I love to write songs. It would have been an avocation, it would not have been my vocation, sir.

Senator MATHIAS. The other side of that coin, Mr. David, is somebody would have collected

Mr. DAVID. They sure would. Everybody. The broadcasters who had been playing that music but not paying for it. An awful lot of people would have been collecting money for that music. But it certainly would not have been Burt Bacharach, it certainly would not have been Hal David, it certainly would not have been Marilyn Bergman for "The Way We Were," and the people who have written all this mediocre music that the broadcasters tell us we have.

Senator MATHIAS. We are still winding up Senator Kennedy's question.

Mr. Cramer, you have one last word on that.

Mr. CRAMER. I just wanted to briefly comment on a point raised, a moment ago, by Senator Kennedy. The Senator, in essence, asked what motive broadcasters had, historically, to look for direct licenses since they were already paying under blanket agreements. But the fact is—as Mr. David pointed out in his response—that the broadcasters had a carve-out provision in their contracts with us. And, for all of the 22 years they had it, they never once used it. Furthermore, when it was taken out of the contract in 1972, it was taken out because the broadcasters asked to have it removed. The full detail is on pages 21 to 23 of my statement.

Senator MATHIAS. I have a question, Mr. Cramer, that Senator Thurmond has asked me to propound to you.

Mr. CRAMER. Sure.

Senator MATHIAS. Let me do that first.

Why should a television station have to pay BMI for music on the basis of revenue generated from all its programming, including news, sports, and so forth, rather than for the music actually used in shows that you produce?

Mr. CRAMER. Well, the stations have an alternative. They can take, under the consent decree, a per program license which would limit the payments just to those programs where BMI music is used, if they want that alternative. In fact, there are two or three stations that have such a license with us now, if they want it.

But the license payment, the percentage, was negotiated by the all-industry committee, and that committee which sat here before you this morning, the representatives, wanted one rate for all stations. They did not seek a different kind of system. If someone wants a different kind of system, it is a subject that can be negotiated, certainly in my view, not something that requires this kind of drastic legislation which would really decimate this industry because, as Mr. Fritts stated, implied, this is really not just local television that is involved.

The ramifications of this will go right down the line immediately without further legislation. It will hit all the cable distribution we get from the Copyright Royalty Tribunal. It will mean a loss of tens of millions of dollars from abroad without further legislation. And it will bring about a request for similar legislation on local cable originations, network and radio.

But if they wanted to negotiate some other kind of deal, and in the almost 20 years I was with BMI, they never once put it on the table.

Senator MATHIAS. Mr. Post, you have written a lot of music and your name shows up on the credits for the programs in which that music is performed.

Have you ever been approached by a television station to purchase the right to publicly perform your music?

Mr. POST. No, sir.

Senator MATHIAS. A network?

Mr. POST. No, sir.

Senator MATHIAS. What would happen if you were?

Mr. POST. I would be completely open to it. I mean I would—

Senator MATHIAS. But it just has not happened?

Mr. POST. No, sir.

You know, also there is another rumor flying around this room today, talking about the fact that, you know, there is the little composer here, but on the other side there is this big entity called the producers that are getting a 50 percent kickback.

And what they are talking about, by the way, is the fact that all producers have publishing companies. But not all producers get all the publishing royalties from every copyright.

In the case of myself and in the case of a number of other composers, we retain a portion of the publishing income as well because I am also a publisher. And I publish a great deal of the music that we write for television.

I know Hal is in the same situation. I just wanted to make that comment.

Mr. CRAMER. Mr. Chairman, could I just have 1 second on this?

In the current issue of Channels magazine, the March issue, there is a list of just four TV companies. Those four TV companies own 30 television stations. And my count shows that they produce 35 shows.

Now, those television stations producing those 35 shows also own, in most instances, a great deal of that music. And I wondered if the payments by ASCAP and BMI and SESAC to those companies owned by broadcasters are also kickbacks?

Senator MATHIAS. Mr. David?

Mr. DAVID. I would suggest one of the reasons that we wind up on a negotiated basis on the blanket license is because it seems to serve the purpose and needs of the broadcasters.

Mr. Fritts, who appeared here earlier as the president of NAB, testified before this subcommittee in the House, in September 1985. And he said this, if I may quote:

This process (blanket license) affords two large entities (that is they and we) with knowledge and experience in the field to negotiate a price that correctly reflects the value of the works in the marketplace. There is no disproportionate size or wealth advantage that one side possesses over the other. Quite to the contrary. There is equality of bargaining positions.

That is the president of the NAB talking about the blanket license being equitable.

Thank you.

Senator MATHIAS. Thank you.

Mr. Thompson.

Mr. THOMPSON. Mr. Chairman, one of the things that occurred to me that Mr. David just triggered into discussion earlier, the proponents of this bill say that, if passed, a new form of residual pay-

ment structure will emerge. And they even go so far as to suggest that there is a comparability between the composer and the screen director and the actors and things of that nature.

I would suggest that insofar as the theme song is concerned, for a television show, a very successful television show, like "Hill Street Blues" as an example, it makes a continuing contribution, whereas the director and actors go from segment to segment, which is one consideration.

I also believe the composers do not want to belong to a union. They do not want the right to strike. They want the right to compose and to have that right protected. That is what happens under the present system of performing rights. And I think that there is an admission on the broadcaster position this morning that by substituting some unknown residual system, what they are really after is doing away with the existing bargaining strength which I think creates good equal opportunities for both parties to be represented.

Senator MATHIAS. Senator SPECTER.

Senator SPECTER. Thank you, Mr. Chairman.

Mr. David, you say that there is an effort here to get the work without paying anything.

How much money are we talking about? What is the total amount on an annual basis now available to composers under the current system?

Mr. DAVID. I think the figure I heard just last year was \$85 million paid to all the composers and publishers, not only in the United States but around the whole world.

Senator SPECTER. What would your expectation be if this legislation were enacted?

Mr. DAVID. I predict that, upon direct licensing or source licensing, the writers would lose 90 percent, 85 percent. I mean I cannot prove what you are asking me. I just do not think we would have any bargaining power at all.

Senator SPECTER. Mr. David, why do you not have bargaining power? You talk about "Butch Cassidy and the Sundance Kid," and your great song, "Raindrops." When movies are involved, do you have the source license and direct negotiations? How does that work out? Does a man with your background and talent have no bargaining power in dealing with that situation?

Mr. DAVID. Well, at the time I wrote "Raindrops," that was in the sixties, I was certainly one of the most successful writers in America. And with that bargaining power, I received \$7,500 for that song, and that was the high. Nobody was getting paid more than that. Nobody was getting paid more than me. And there would be no way for me to be in the music business as a profession unless I also had the blanket license through ASCAP or BMI. It just would have been an impossibility, sir.

Senator SPECTER. Well, let me proceed for a moment, sir. What happened when you negotiated on "Raindrops"?

Had you written the song in advance of the negotiations?

Mr. DAVID. No, sir.

Senator SPECTER. You were hired to write a song?

Mr. DAVID. Hired to write a song, prior to writing it, correct, sir.

Senator SPECTER. All right.

So would you have received the \$7,500 if your song had not been useful to the other contracting party?

Mr. DAVID. I am quite sure that my contract would have seen to it that I would be paid, whether the song was the accepted music or not—a lot of music that is purchased for films or TV is never used. I mean that is the problem producers have. There is a great expenditure.

Most of the television programs that are made are programs that are not shown on television. They do not make it, and if they are shown, they never last past 13 weeks. And most films are not necessarily successful.

Senator SPECTER. Well, under the current arrangement, if a composer's work is not used, he does not get paid at all?

Mr. DAVID. Under the current arrangement? That is all according to your contract.

I would not sign a contract where I would be paid for my music. Now, if the music is not popular, is not in a film or a TV show, does not have access to the public and does not achieve any kind of success, I am not receiving any money from ASCAP BMI, or any other society. We are only getting paid on the blanket license to the extent that our music is actually performed.

Senator SPECTER. You received only \$7,500—

Mr. DAVID. At that time, yes, sir.

Senator SPECTER. From "Raindrops" on the movie.

How much have you received from the song played on radio and television?

Mr. DAVID. It would be hard for me to give you a figure. But it was an enormous hit and an enormous standard.

I received a great deal of money, sir.

Senator SPECTER. Can you give us a ballpark figure?

Mr. DAVID. I will get it to you. I just do not know and I do not want to give you a figure that makes no sense whatsoever when I look at it and I will be embarrassed that I said too much or too little.

Senator SPECTER. The arrangement for movies is as a result of a court decree with antitrust implications. Should we change the law on that to put you on the same footing that you have now with radio and television?

Mr. DAVID. Well, you know, there was a court decision and an antitrust decision which came out down against ASCAP, not BMI—

Senator SPECTER. But somebody might write a bill dealing with the movies so I could counterclaim in a lawsuit.

Mr. DAVID. Yes. Because that was the remedy given by the court to the broadcasters judicial review. I agree with you, sir.

Senator SPECTER. Well, wait a minute. Do not agree with me. It is a question.

Mr. DAVID. A question, yes, because we at ASCAP have long ago cured all the ills that created the situation that we lost in that theater antitrust action. That was a remedy to address certain antitrust ills that had occurred, and there is no reason why we should not go to the Justice Department at this point and hope to have that set aside. Because all those ills have been cured, as the court of appeals has said when the same arguments came up. Now, we do

not violate the antitrust laws. Yet the broadcasters would like to have the same remedy, having lost the case, as they would have if they had won the case.

Mr. CRAMER. Senator, I think there is a misunderstanding here, and Mr. Fritts and others said that—I think he said that the law requires that they be cleared at the source for motion picture theaters. That is not correct. Not at all.

That requirement that writers give the performing rights at the same time they grant synchronization rights for films that are exhibited in theaters applies only to ASCAP and its members as a result of illegal activity nearly 40 years ago.

Now, I agree with Mr. David that any illegal activity that took place 40 years ago in the theaters is gone. And why that law, not the law, why that penalty should be applied today to ASCAP writers who were not even born 40 years ago, I do not know.

Senator SPECTER. It does not apply to BMI?

Mr. CRAMER. It does not apply to BMI, it does not apply to SESAC, it does not apply to anybody in this room who writes music that is embodied in motion pictures. It does not apply to foreign composers. And when the law was revised in 1976, after 20 years of hearings, when everybody had an opportunity to speak on it, and the broadcasters participated. And there was no request to change law to require clearance for all music at the source for motion picture theaters.

And how you make the quantum jump from an illegal practice 40 years ago by ASCAP to 1986 where there has been no showing of illegal conduct in television by ASCAP or BMI, and impose that penalty on everybody, I cannot understand. It is just not correct.

Senator MATHIAS. Senator Leahy.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman.

I apologize for not having been here earlier, and I will not take up the time with a long opening statement. I will have a number of questions. One I was going to ask was just answered. I have a number of questions for the record.

I was tied up in a meeting of the Intelligence Committee all morning on a matter of some urgency, and I guess it will go on for some time to come, and I will be leaving to go back to it.

But as I go through the record of this hearing, one of the things that will help me make up my mind about the legislation is whether the proponents of the bill have answered three questions.

First, is there a problem; is the current system for licensing music unfair?

Second, if there is a problem, is it one that is more appropriately solved by the Congress than by the free marketplace or an anti-trust consent decree court?

And, finally, if the first two points can be satisfactorily established, is the proposed legislative solution a sensible and fair one?

I expect that in one form or another, people have testified to those same three questions. And I think, Mr. Chairman, that it is

extremely important that you held these hearings. My staff gave me a quick rundown of what went on this morning

As I said, if I could have your permission, after seeing the transcript, I may want to submit some more questions.

Senator MATHIAS. Without objection, that permission is granted, and I will join you in doing so.

Senator LEAHY. Thank you, Mr. Chairman.

Senator MATHIAS. Thank you very much, gentlemen.

Now, since we are running late, to conserve time, I am going to ask panels 3 and 4, which are both short panels, to come to the table together.

Mr. Thomas Valentino of New York; Mr. Fred Epstien of Storer Communications of Miami; Mr. Jack Valenti of the Motion Picture Association of America; and Mr. Mel Blumenthal, executive vice president, MTM Enterprises.

Senator HATCH. Mr. Chairman, could we put some additional questions by Senator Thurmond in the record so that they can be answered?

Senator MATHIAS. I have his additional questions.

Senator HATCH. OK. That is fine. Just so they are in.

Senator MATHIAS. They are already in the record.

If we can clear the aisle there so the witnesses can get to the table.

Mr. Valenti. Mr. Blumenthal.

Yes, Mr. Valenti, will you come? We will compress panels 3 and 4.

Mr. Blumenthal. Since we are running later than scheduled, do any one of you have time problems which make a difference in the order in which you are——

Mr. VALENTI. I have got a lot of problems but that is not one of them, Senator.

Senator MATHIAS. Well, then, we will ask the witnesses to compress their testimony as much as it is humanly possible to do it so that we can complete this panel before we have to adjourn.

STATEMENTS OF PANEL CONSISTING OF THOMAS VALENTINO, PRESIDENT, VALENTINO, INC., MUSIC PUBLISHERS, NEW YORK, NY; FRED EPSTIEN, STORER COMMUNICATIONS, INC., MIAMI, FL; JACK VALENTI, PRESIDENT, MOTION PICTURE ASSOCIATION OF AMERICA, WASHINGTON, DC; AND MEL BLUMENTHAL, EXECUTIVE VICE PRESIDENT, MTM ENTERPRISES, INC., STUDIO CITY, CA

Mr. VALENTINO. Mr. Chairman, thank you for this opportunity to testify this morning on behalf of S. 1980.

My name is Tom Valentino, and I am president of Valentino, Inc. Our company is an independent music publishing company which licenses synchronization and performance rights in copyrighted music to producers of television programs.

We have been one of the leading independent publishers for almost 30 years. I am affiliated as a publisher with both ASCAP and BMI, and I am for passage of S. 1980.

The catalog which I am holding in my hand lists over 3,000 copyrights owned by my company. These titles represent the output of approximately 50 composers who rely on us to market their works.

Mr. Chairman and members of the subcommittee, it may be helpful for me to define some terms for you in the industry.

When I say we market synchronization rights, I am referring to the right of the copyright owner to synchronize music with the visual images on a film or tape; in other words, to dub the music into the show.

When I talk about performance rights, I am referring to the right to perform for the public, by broadcast or theatrical exhibition, the music which has been synchronized into the film.

When we license the synchronization rights of our composers' works, we deal directly with the program producer on a case-by-case basis.

When we license performance rights, we do so mainly through ASCAP and BMI, who then pay us the publisher's share you heard about in earlier testimony.

When we license synchronization rights, we negotiate on a case-by-case basis with the studios involved. In these kinds of direct negotiations, we are usually able to arrive at a satisfactory price which provides equitable compensation for the work involved.

With regard to performance rights, it is another matter, however.

Because of the fact that performance rights are licensed on a blanket basis, with no direct case-by-case negotiation, we and our composers are compensated from one of two large pools collected by ASCAP and BMI, which are then disbursed on the basis of survey data and an arbitrary formula. The importance to a show of a given musical work is not a factor.

Because of this rather arbitrary system, both us and our composers are poorly compensated for performance rights. To give you an example, I published some of the music for "Life Styles of the Rich and Famous," which is a currently popular syndicated show. My BMI statement for the last quarter indicated that a selection of our music was aired over 2,300 times during the reporting period. I received a grand total of \$11.81. It is sort of hard to make a living on that kind of return.

And that brings me to why I am here, Mr. Chairman, and why I support S. 1980.

You have heard a great deal from the previous panel about how the little guy benefits from the present system. Well, I am a little guy, and I respectfully suggest that just is not the case.

The chart behind me shows where the money really goes. The top half of the chart represents the money ASCAP and BMI pay to music publishers, and the bottom half shows what is paid by them to composers.

With regard to publishers, my company is representative of about 30,000 publishers, who divide up what is shown in blue. Ninety percent of the money goes to a relative handful of publishers of the type described earlier by Mr. Arries, shown on the chart in red. These who are studios who hire staff composers and then arbitrarily use their powers as copyright owners to designate them-

selves as publisher for purposes of receiving the ASCAP and BMI distributions.

The bottom half of the chart reflects what happens to composers. The most important part of that half of the chart is the line which notes that 85 percent of ASCAP and BMI's composer members and affiliates receive nothing. This information was supplied to me by ASCAP and BMI. The vast bulk of the money goes to the few composers affiliated with the studios. And that is shown in green. Many of these composers are here in the room. And one of them has testified to you.

Mr. Chairman, this chart illustrates why I am here in support of S. 1980.

The present system benefits only the big Hollywood studio publishers and a handful of composers who work for them.

My composers and I would fare far better in an open market where we could negotiate compensation, including residual payments, for performance of our music on a case-by-case basis like we do in the case of synchronization rights. Then we could be sure of receiving payment. We would be able to arrange for fair payment and not have to rely on an arbitrary blanket license system which is geared toward the big Hollywood studios.

If S. 1980 is passed, the purposes of the copyright law will be promoted. The law will actually work to provide incentive to thousands of music publishers and composers. The red and green parts of the pie on the chart will get smaller, and the blue and white parts will grow, creating opportunity for artists all over America.

Thank you very much.

[Statement of Mr. Valentino and chart referred to above follows:]

PREPARED STATEMENT OF THOMAS VALENTINO

SUMMARY

Valentino Music has been a leading independent publisher for over three decades, licensing over 3000 titles.

We must compete in a market dominated by large studio-owned publishing operations.

When we license the right to dub our music into a prerecorded TV program we compete in a free and open marketplace.

However, when we license broadcast performing rights we operate in a system controlled by ASCAP and BMI and which is geared to benefit the major studio publishers and their hired composers.

Ninety percent of all performance royalties collected today by ASCAP and BMI and paid to publishers goes to the studios which own the shows involved.

The 30,000 independent publishers like Valentino get what is left over. In the case of composers, only a few hundred truly benefit. Eighty-five percent get nothing.

S.1980 will restore the copyright incentive by permitting us to bargain freely in the marketplace for sale of our music without going through ASCAP and BMI.

* * *

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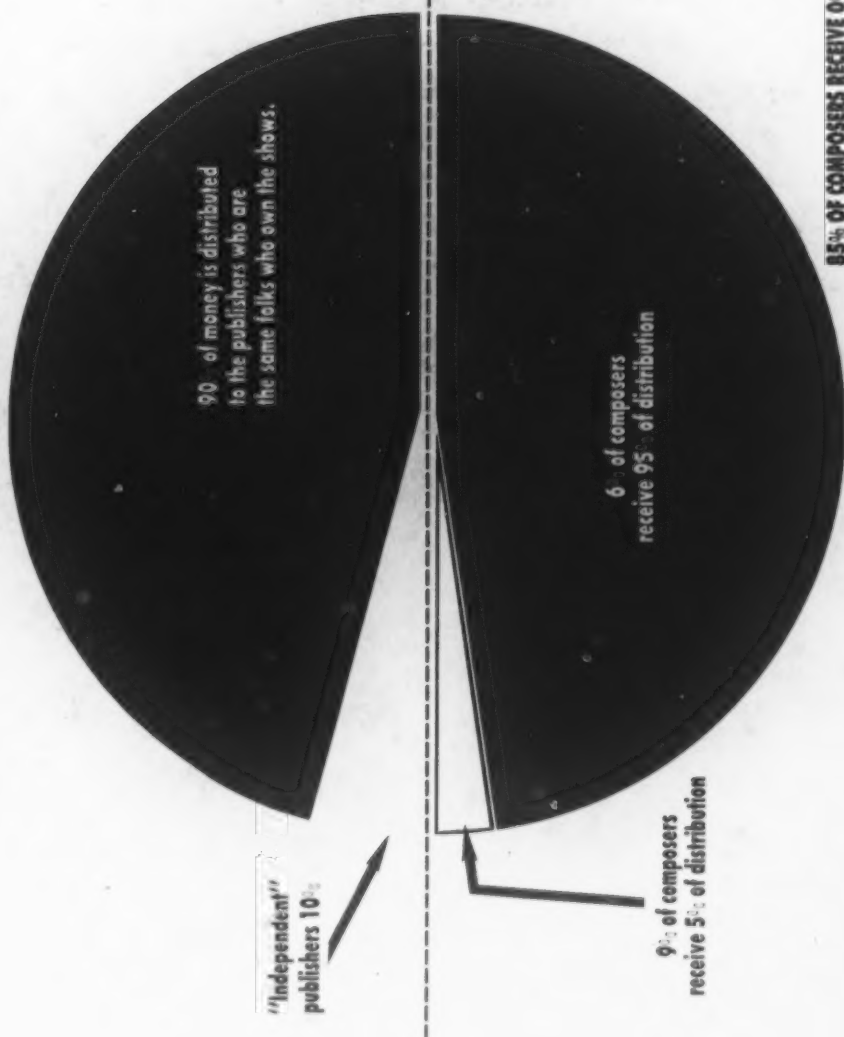
Then we would be sure of receiving payment. We would be able to arrange for fair payment and not have to rely on an arbitrary blanket license system geared toward the big studios.

We also would be freed from the 20 percent cut for administration ASCAP and BMI take for themselves for providing services we could better perform for ourselves.

If S.1980 is passed, the purposes of the copyright law will be promoted. The law will actually work to provide incentive to thousands of music publishers and composers. The red and green parts of the pie on the chart will get smaller and the blue and white parts will grow - creating opportunity for artists all over America.

Analysis of Combined ASCAP/BMI Money

Local Television Distribution



Senator MATHIAS. Just follow right along.

STATEMENT OF FRED EPSTIEN

Mr. EPSTIEN. Mr. Chairman, my name is Fred Epstien.

For 3 years, from 1982 until 1985, I was a staff attorney at Storer Communications, a Miami-based broadcasting and cable company which owns seven television stations throughout the country. Six of those stations are network affiliated and one is an independent. I am no longer employed by Storer. I currently work for the investment firm of Kidder Peabody & Co.

One of my primary responsibilities at Storer—which is the reason for my appearance today—was to seek to obtain music-performing rights licenses for our stations from sources other than ASCAP, BMI, and SESAC.

As I will describe in a bit more detail shortly, the response I received in our attempts to obtain source licensing from our syndicated program suppliers was uniform, loud, and clear—that is a resounding no. It is for that reason that I find the current statements of the MPAA and other syndicator representatives, which might appear to reflect a cautious willingness to engage in source licensing, to be, instead, a deliberate attempt in the course of lobbying against S. 1980 to disguise their true intentions.

Storer initially sought to obtain source licensing from its syndicated program suppliers prior to the trial in the Buffalo Broadcasting case. At that point, we were, in essence, responding to the “dare” which we had received from ASCAP’s lawyers; that is, ASCAP’s invitation “to go start knocking on people’s doors” to determine the willingness, or unwillingness, of syndicators to clear music rights at our request.

Storer’s general counsel, Abiah Church, wrote a letter to our principal program suppliers which clearly indicated Storer’s desire to negotiate and pay for, as part of the overall syndicated program purchase price, all music rights clearances, including performing rights.

Let me read you some of the examples of the responses, or should I say refusals, which Storer received, and I am quoting:

United Artists said that it was unwilling “to change the framework and nature of its licensing agreements” because it would “deny the performing rights societies their rightful share of TV station gross receipts.”

MGM told us that it “cannot agree to any such change, nor are we willing to change the way we do business.”

Viacom told us that it would not provide source licensing because “it is not current industry practice” to do so.

And there were many, many more.

Now, Mr. Chairman, I am a lawyer. I am therefore familiar with rules of evidence which sometimes, for technical or other reasons, render certain documents inadmissible during a trial. The courts in the Buffalo case determined that the syndicators’ responses, because of their proximity in time to the actual trial were inadmissible as a matter of law. I understand that the opponents of the proposed legislation often highlight this. But the real point is, admissi-

ble or not in a court of law, the syndicators said what they said. That much cannot be denied.

After the trial in the Buffalo Broadcasting case, Storer stepped up its efforts to obtain source licenses from our program suppliers. The district court judgment provided us with an opportunity, if we were able to obtain music performing rights from sources other than ASCAP and BMI, to apply to the court to seek a further reduction in our license fee payments. Prior to this time, no opportunity to "carve out" from the ASCAP blanket license had existed.

Storer, at that time, made a corporate decision to continue to seek source licenses with the hope that under the court judgment, we would be able to obtain a reduction in our ASCAP/BMI fees. I personally contacted virtually all of our major program suppliers and sought to obtain from them program packages with all music clearances included. Again, however, the answer was a uniform no. The most we were able to get from our syndicators was a promise that if the Buffalo Broadcasting case was ultimately, after all appeals, decided in the broadcasters' favor, the syndicators at that time would renegotiate the contract with the intent to negotiate a fee for the music performing rights contained in their programs. ASCAP and BMI, of course, ultimately prevailed in the lawsuit, and syndicator unwillingness to source license just hardened. In fact, they refused to further discuss the matter.

Let me underscore the fact that I, on behalf of Storer, was ready and willing to pay additional amounts of money for the acquisition of programming which included music performing rights as part of the program package. And I told that to the syndicator representatives with whom I spoke with directly. Storer never expected a "free ride" as it pertained to obtaining performing rights. It was the syndicators, not Storer, who were totally unwilling to talk prices.

I was thus dumbfounded when I heard that the syndicators had suggested, in opposing S. 1980, that they would be willing to negotiate source licenses if only broadcasters were willing to pay for them. This is just not true. I have letters here of examples of my letters to syndicators asking for those rights and stating that we were willing to pay for them.

What I was told, for example, was, in the words of 20th Century Fox, and I am quoting: "Source licensing is not acceptable to us in light of the historic practice of television stations obtaining blanket licenses from ASCAP and BMI."

Mr. Chairman, I believe that the passage of S. 1980 is the only way that source licensing will ever happen. All statements that it is otherwise available are simply false. And if source licensing is not attainable by Storer, a multiple-station owner in major markets, it is certainly not attainable by the hundreds of other smaller television stations throughout the country.

Thank you for the opportunity to speak today.

Senator MATHIAS. Mr. Epstien, you referred to letters, correspondence. Do you have them with you?

Mr. EPSTIEN. Yes, I do.

Senator MATHIAS. Could you provide copies of them for the record?

Mr. EPSTIEN. I would be happy to provide the copies I have with me and provide others after that.

[Submissions of Mr. Epstien follow:]

PREPARED STATEMENT OF FREDRIC EPSTIEN

SUMMARY

I was the staff attorney at Storer Communications responsible for attempting to seek music performance rights from sources other than ASCAP, BMI, and SESAC.

The Hollywood studios which own these rights along with all other copyrights in a show consistently refused to negotiate for the direct licensing of music when the other rights were sold.

Program syndicators are now suggesting that they have been willing to negotiate source licensing if broadcasters would be willing to pay for them.

This suggestion is completely at odds with their actual behavior. Our real experience is best reflected in the words of a letter to me from 20th Century-Fox which concluded simply, source licensing is not "acceptable to us."

Enactment of S.1980 is the only way to bring music licensing into the true marketplace.

* * *

Mr. Chairman, my name is Fredrick Epstien. For 3 years from 1982 until 1985, I was a staff attorney at Storer Communications, Inc., a Miami-based broadcasting and cable company which owns 7 television stations located throughout the country. Six of those stations are network-affiliated stations and one is an independent station.

One of my responsibilities at Storer -- which is the reason for my appearance before this Committee today -- was to seek to obtain music performing rights licenses for our stations from sources other than ASCAP, BMI and SESAC. As I will describe in a

bit more detail shortly, the response I received in our attempts to obtain source licensing from our syndicated program suppliers was uniform, loud and clear -- that is, a resounding "NO!" It is for that reason that I find the current statements of the MPAA and other syndicator representatives -- which might appear to reflect a "cautious" willingness to engage in source licensing -- to be, instead, a deliberate attempt, in the course of lobbying against S.1980, to obfuscate these companies' true intentions.

Storer initially sought to obtain source licensing from its syndicated program suppliers prior to the trial in the Buffalo Broadcasting antitrust lawsuit brought by the local television stations. At that point, we were, in essence, responding to the "dare" which we had received from ASCAP's lawyers; that is, ASCAP's invitation "to go start knocking on people's doors" to determine the willingness -- or unwillingness -- of syndicators to clear music rights at our request. Storer's General Counsel, Abiah church, wrote a letter to our principal program suppliers which clearly indicated Storer's desire to negotiate and pay for, as part of the overall syndicated program purchase price, all music rights clearances including performing rights.

Let me read you some examples of the responses -- or should I say refusals -- which Storer received:

- United Artists said it was unwilling "to change the framework and nature of [its] licensing agreements", because it "would deny [the performing rights societies] their rightful share of [TV station] gross receipts"
- MGM told us that it "cannot agree to any [such] change ... nor are we willing to change the way we do business"
- Viacom told us that it would not provide source licensing because "it is not current industry practice" to do so

And there were many more.

Now, I am a lawyer. I am therefore familiar with rules of evidence which sometimes -- for technical or other reasons -- render certain documents inadmissible during a trial. The courts in the Buffalo Broadcasting case determined that the syndicators' responses, because of their proximity in time to the actual trial, were inadmissible as a legal matter. I understand that the opponents of the proposed legislation often highlight this. But the real point is, admissible or not, the syndicators said what they said; that much cannot be denied.

After the trial in the Buffalo Broadcasting case, we stepped up our efforts to obtain source licenses from our program suppliers. The district court judgment provided us with an opportunity, if we were able to obtain music performing rights from sources other than ASCAP and BMI, to apply to the Court to seek a reduction in our license fee payments to ASCAP and BMI. Prior to this time, no opportunity to "carve out" from the ASCAP blanket license had existed.

Storer at this time made a corporate decision to continue to seek source licenses with the hope that, under the court judgment, we would be able to obtain a reduction in our ASCAP/BMI license fees. I personally contacted virtually all of our major program suppliers and sought to obtain from them program packages with all music clearances included. Again, however, the answer was "NO." The most we were able to get was a promise that, if the Buffalo Broadcasting case was ultimately -- after all appeals -- decided in the broadcasters' favor, the syndicators at that time would negotiate a fee for the music performing rights contained in their programs. ASCAP and BMI, of course, ultimately prevailed in the lawsuit; and syndicator unwillingness to source license just hardened.

Let me underscore the fact that I, on behalf of Storer, was ready and willing to pay additional amounts of money for the acquisition of programming which included music performing rights as part of the program package; and I told that to the syndicator

representative with whom I dealt. It was the syndicators -- not Storer -- who were totally unwilling to talk prices.

I was thus dumbfounded when I heard that the syndicators had suggested, in opposing S.1980, that they would be willing to negotiate source licenses if only broadcasters were willing to pay for them. That is just not what I was told. What I was told, for example, was -- in the words of 20th Century-Fox: source licensing "is [not] acceptable to us," in light of the "historic practice of television stations obtaining blanket licenses from ASCAP, BMI, etc."

Mr. Chairman, I believe that the passage of S.1980 is the only way that source licensing will ever come about. All protestations that it is otherwise "available" are simply at odds with the real world. And if source licensing is not attainable by Storer, a multiple-station owner, it is certainly not attainable by the hundreds of other smaller station owners sprinkled across the country.

Thank you for the opportunity to speak today.

Hon. Charles McC. Mathias, Jr.
United States Senator
Chairman, Subcommittee on Patents,
Copyrights and Trademarks,
Committee on the Judiciary
Washington, D.C. 20510

April 25, 1986

Dear Mr. Chairman:

During my testimony before you on April 9, 1986 concerning S.1980, you asked me to supply to you and the members of the Subcommittee certain documents quoted in my written testimony and referenced in my oral testimony. Attached to this letter are the documents you requested, along with a brief explanatory index. I also would like to make a few brief comments and have them become part of the official record of this matter along with my prior testimony.

The attachments hereto consist of many requests made by myself, Abiah Church, and other representatives of Storer Communications, Inc. ("Storer") directed to a variety of Storer's syndicated program suppliers, together with responses thereto. The letters all concern our efforts to obtain music performing rights as a part of the total program package, i.e., "cleared at the source."

You will see in virtually every instance of an initial contact from Storer to a syndicator on this subject that Storer expressly stated that it was ready and willing to pay an additional fee for the inclusion of music performing rights clearance -- that Storer did not expect a "free ride." As I stated during my testimony, Storer did offer and has always been willing to pay for and negotiate a reasonable additional cost for obtaining music performing rights as part of the program package. And the enclosures hereto confirm my testimony that it was the syndicators, not Storer, who were unwilling to discuss price.

Please note that a syndicator's refusal to discuss source licensing was sometimes reflected in its refusal to discuss changes to the standard paragraph on music performing rights contained in syndication contracts. This is true, for example, with respect to one of the letters which I referred to during my testimony: from Dan McRae of Warner Brothers to Art McCall of our Cleveland Station WJKW, which states that "[w]e cannot accept any provisions contrary to the provision of Article SIXTH" relating to music licensing.

Other of the letters enclosed reflect the most which Storer was able to receive, that is, a clause to the effect that if the Buffalo Broadcasting case was ever upheld on appeal, then the matter of music performing rights would be subject to renegotiation. Once that litigation ended in favor of the licensing societies, this clause proved to be totally meaningless.

Mr. Chairman, the letters attached are just a sampling of the numerous correspondence to and from the syndicators that I was personally involved with on behalf of Storer concerning our efforts to obtain source licensing. Unfortunately, since I am no longer with Storer, it has been difficult to locate all my personal files. But I want to reaffirm, as a member of the federal bar, to the members of this Subcommittee: (i) that I did seek, both in writing and by telephone communications, to obtain source licensing on behalf of Storer's stations by direct requests to people like Benson Begun and Stanley DeCovnick of 20th Century-Fox, Anita Van Petten of MGM-UA, Dan McRae of Warner Brothers, M. Blumenthal of MTM Productions, Edward Gilbert of ITC Entertainment, Deborah Willard and Martin Kaplan of Embassy Communications, Stephen Ross of Telepictures, Alex Horwitz of Orion, and Marlynda Salas and Myron Dubow of Columbia Pictures just to name a few; (ii) that I stated that Storer expected to and was willing to pay a reasonable additional cost for obtaining clearance of music performing rights as part of the program package; and (iii) that any assertions by syndicators to the contrary are simply untrue. In fact, Mr. Chairman, the letter which Mr. Valenti referred to during his testimony -- dated February 24, 1986 from Warner Brothers to the effect that Warner Brothers was willing to discuss and negotiate the matter of music performing rights -- was written not to me or Storer in response to our direct requests, but to Representative Robert W. Kastenmeier of the House of Representatives in connection with the companion legislation pending in the House, H.R. 3521.

I thank you for the opportunity to submit these supplemental remarks and accompanying materials.

Respectfully submitted,


Fredric E. Epstien

Attachments to Letter Dated
April 25, 1986 from Fredric E. Epstien

Annex A: Letters quoted in written submission
 of Fredric Epstien dated April 9, 1986.

SAMPLE FORM OF LETTER SENT BY
 ABIAH CHURCH TO ALL MAJOR
 SYNDICATED PROGRAM SUPPLIERS
 OF STORER STATIONS REFERENCED
 ON PAGE 2 OF EPSTIEN WRITTEN
 SUBMISSION OF APRIL 9, 1986

July 2, 1981

Mr. Daniel J. Lobel
 Director Contracts & Television Systems
 United Artists & Television, Inc.
 779 Avenue of the Americas
 New York, N. Y. 10019

RE: MUSIC PERFORMANCE RIGHTS FEES

Dear Mr. Lobel:

Storer Broadcasting Company has determined that it wishes to explore the possibility of altering the provisions of the standard music warranty paragraph contained in distribution agreements between your company and Storer's several television stations. As you are aware, the current music warranty language generally provides that "the distributor warrants that performing rights in all musical compositions contained in all pictures licensed under the distribution agreement are licensed by ASCAP, BMI or SESAC; are in the public domain; or are controlled by distributor to the extent required for the purposes of this Agreement".

Storer Broadcasting Company has concluded that a more equitable arrangement with regard to music included in pictures covered by distribution agreements would include music performance rights as a part of the total license rights being purchased by the station. This procedure would conform to the current practice with regard to licenses for distribution of motion pictures to theatres. To put it another way, Storer would prefer that your company, as distributor, clear music performance rights at the source.

Storer recognizes that for the distributor to warrant that all music performance rights are controlled by it may require, in some instances, an adjustment in the basic license fee; however, Storer further believes that, because of the relative disparity in the bargaining positions of the distributor and the stations with the music licensing societies, the total expenditure for music performance rights would be reduced to a more reasonable level for the stations.

Upon the completion of your review of the matters set forth in this letter, please contact the undersigned in order that we may move toward final resolution of this matter at the earliest practicable opportunity.

Very truly yours,


 Abiah A. Church

CC: Kenneth Bagwell

STORER
BROADCASTING COMPANY

1177 RANE CONCOURSE, MIAMI BEACH, FLORIDA 33154 • TELEPHONE (305) 866-0211

ABIAH A. CHURCH
VICE PRESIDENT, GENERAL COUNSEL
AND SECRETARY

July 2, 1981

RE: MUSIC PERFORMANCE RIGHTS FEES

Gentlemen:

Storer Broadcasting Company has determined that it wishes to explore the possibility of altering the provisions of the standard music warranty paragraph contained in distribution agreements between your company and Storer's several television stations. As you are aware, the current music warranty language generally provides that "the distributor warrants that performing rights in all musical compositions contained in all pictures licensed under the distribution agreement are licensed by ASCAP, BMI or SESAC; are in the public domain; or are controlled by distributor to the extent required for the purposes of this Agreement".

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Upon the completion of your review of the matters set forth in this letter, please contact the undersigned in order that we may move toward final resolution of this matter at the earliest practicable opportunity.

Very truly yours,

Abiah A. Church

CC: Kenneth Bagwell

Annex B:

SYNDICATOR LETTERS QUOTED ON
PAGE 2 OF EPSTIEN WRITTEN
SUBMISSION OF APRIL 9, 1986

METRO-GOLDWYN-MAYER FILM CO. 10202 W. Washington Blvd. Culver City, California 90230 (213) 836-3000



MGM

Mr. Abiah A. Church
Vice President, General Counsel
Storer Broadcasting Company
1177 Kane Concourse
Miami Beach, FL 33154

July 17, 1981

Storer Broadcasting Company
Miami Beach Office

RECEIVED JUL 20 1981

A. A. CHURCH

Re: Music Performance Rights Fees

Dear Mr. Church:

Your letter of July 2, 1981 to Mr. Joseph C. Tirinato has been referred to me for response. We are not willing to comply with your proposal for altering the music warranty paragraph of the television syndication agreements between MGM and Storer.

The customary type of license which MGM receives from the music publishing companies is a license to synchronize the music on our motion picture soundtracks and to performance of such music in motion picture theatres only; the performance grant is always subject to clearance by television stations or networks of the performance rights from ASCAP or BMI. We have entered into innumerable licenses of this type for our many features and television programs over the years and these are the only kinds of licenses music publishers issue to us at the present time.

It would be virtually impossible for MGM to renegotiate its music licenses to include television performances, and in any event, the fee that MGM would have to pay to secure such a performance license covering television networks and stations (if we could get such rights) would be prohibitively high and could never be recouped even if the license fees charged to broadcasters like Storer were substantially increased. Further, it would be impossible for us to coordinate the securing of music performance licenses for television unless every television station licensed by us around the country agreed to increase the basic license fee paid to us to offset our expenditure in securing those rights for them. As you can imagine, this would be a mammoth task doomed to failure from the outset.

The kind of music warranty contained in our current television licenses is the only warranty which we are legally able to grant in view of our many existing music licenses as well as the form of music license which is customarily issued by music publishers. We, therefore, cannot agree to any change in our current music warranty clause nor are we willing to change the way we do business.

Very truly yours,

Anita R. Van Petten

Anita R. Van Petten
Attorney at Law

ARVP/lf

July 27, 1981

Storer Broadcasting Company
Miami Beach Office

RECEIVED JUL 29 1981

A. A. CHURCH

Mr. Abiah A. Church
Vice President
Storer Broadcasting Company
1177 Kane Concourse
Miami Beach, Florida 33154

RE: MUSIC PERFORMANCE RIGHTS FEES

Dear Mr. Church:

We acknowledge receipt of your letter dated July 2, 1981 requesting that United Artists Television Inc. change its current form of licensing to include a warranty stating that all monies owed to music performance rights societies have been satisfied by the distributor.

United Artists is unable at this time and in the foreseeable future to change the framework and nature of the licensing agreements for our motion pictures. After exploring the equities we have determined that the proposed modification would be violative of the policies for which "performing rights" were originally instituted and would deny these organizations their rightful share of the gross receipts of the party fully benefitting from the use of the musical property.

We appreciate your inquiry, however it would be both undesirable and inappropriate for United Artists to adopt your proposed modification. Unless there are significant changes in the structuring and policies of performing rights agencies, we do hope this issue will remain closed for any current as well as all future negotiations with Storer.

Very truly yours,

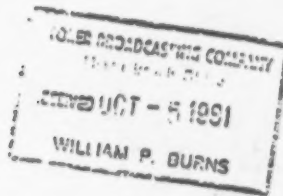
David Cornell
David Cornell

DC:naf

cc A. Sporer
M. Robinson
D. Lobel



David A. DeLoach
Deputy General Counsel



September 30, 1961

Mr. William P. Burns
Sterer Broadcasting Company
1177 Main Concourse
Miami Beach, Florida 33154

Re: Music Performance Rights

Gentlemen:

Reference is made to your letter of July 30, 1961, with respect to music performance rights fees. As you are aware, music performance rights licenses are included in the rights package for theatrical distribution of motion pictures pursuant to a court decision mandating such inclusion. However, it is not current industry practice for music performing rights licenses to be included in connection with the television exhibition of motion pictures.

Accordingly, we do not believe it feasible for us to clear music performance rights licenses for television exhibition at the program supplier level.

If you have any questions, please feel free to contact me.

Sincerely,

DAD/mc

cc: Mr. Zalecki

Sample of letters to and from syndicators
relating to Storer source licensing requests
1983-1985.



May 16, 1983

Sue Green
Program and Operations Assistant
WITI-TV
P.O. Box 17600
Milwaukee, Wisconsin 53217

Re: PRIME TIME SHOWCASE 1 & 2 (UAC)
LION II
PRIME TIME SHOWCASE 1 & 2 (WARNER)

Dear Ms. Green:

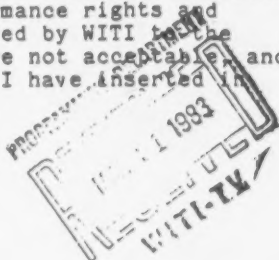
Enclosed please find revised copies of the above-referenced agreements. Some of the changes made in the agreements which you forwarded under cover of your letter dated February 17, 1983 to Joseph C. Tirinato have been retained in the agreements. I have set forth our comments on your other proposed revisions below:

PARAGRAPHS 9 & 10 OF THE STANDARD TERMS - The changes made in these paragraphs are not acceptable since MGM/UA was not a party to the Buffalo Broadcasting decision. Accordingly, we cannot be bound by the decision in Buffalo Broadcasting, and in any event, we prefer to await the final outcome of the Buffalo Broadcasting decision before changing the manner in which we do business. Please note that your Station's blanket music performance license with ASCAP and BMI will continue in effect until at least February 1, 1984.

PARAGRAPH 17 OF THE STANDARD TERMS - Your proposed revision was not acceptable, however, I have inserted compromise language into the agreement which I trust will be agreeable to you.

RIDER TO AGREEMENT - Your Paragraph 28 has been deleted because the warranty of Distributor's right to grant the license to WITI to telecast the pictures is already set forth in the first sentence of Paragraph 9 of the Standard Terms. MGM/UA makes such warranty except with respect to music performance rights and except with respect to material which is added by WITI to the pictures. The terms of your Paragraph 29 are not acceptable, and that paragraph has therefore been deleted. I have inserted in

ARVP:dkm
wittitvltr



its place the language contained in Paragraph 21 of the "THAT'S ENTERTAINMENT" contract with WITI-TV which was signed recently. We will not agree to indemnify WITI with respect to music performance fees which may become due for the reason set forth above with respect to the pending appeal of the Buffalo Broadcasting decision. Paragraph 30 of the Rider is not acceptable and has been deleted. All of these pictures were available to WITI for screening prior to the time when this contract was entered into, and WITI determined at that time that the pictures were suitable for broadcast. WITI cannot now reserve a right to reject the Pictures; this should have been done at the outset by not entering into the agreement with us at all. Paragraph 31 is acceptable. Paragraph 32 is acceptable with the noted change. Paragraph 33 of the Rider is not acceptable but a compromise has been inserted into Paragraph 17 of the Standard Terms to cover this point.

All of the agreements have been revised in accordance with the foregoing and have been executed on behalf of MGM/UA. I would appreciate your initialing the revisions and returning the contracts directly to Stacey Valenza, our Contract Administrator in New York.

Please give me a call if you have any questions (213-558-5564).

Very truly yours,

Anita R. Van Petten

Anita R. Van Petten
Attorney at Law

cc: Karla Davidson
Stacey Valenza

Dan McRee
Director of
Domestic Contracts

May 24, 1983



WARNER BROS.
TELEVISION
DISTRIBUTION, INC.

4000 Warner Boulevard
Burbank, California 91522
213 954-6031

Storer Communications, Incorporated
WJKW-TV
5800 South Marginal Road
Cleveland, Ohio 44103

Attention: Arthur MacColl

Gentlemen:

We are enclosing one fully executed copy each of the agreements dated January 12, 1983 licensing the telecasting of the following product over WJKW-TV, Cleveland, Ohio:

VOLUME 23
SCRUPLES

We are also enclosing a fully executed copy of Appendix A relating to each of the aforementioned agreements. These appendices should be placed in your public file.

Please note that we have reinstated Article SIXTH of the General Terms and Conditions of the agreements, which you deleted. Also, we have reinstated Paragraph 25 of the previously agreed upon Riders attached to the agreements, which paragraph you deleted. We have also revised Paragraphs 27 and 28 of said Riders, which paragraphs you added, to conform to Paragraphs 17 and 18 of said Riders, which paragraphs you deleted. We cannot accept any provisions contrary to the provisions of said Article SIXTH.

Since the agreements now conform to previous agreements between our companies, please sign and return the enclosed copy of this letter to indicate your approval and acceptance of the foregoing revisions and reinstatements.

Please address all communications relating to the booking and/or shipping of these pictures to:

Warner Bros. Television
Booking Department
630 Ninth Avenue
New York, New York 10036 212-484-8945



A Warner Communications Company

For any promotion material or information, please ask your Promotion Manager to contact Mr. Louis Marino at the above New York address or at telephone number 212-484-8963.

If we can be of any further service, please do not hesitate to call upon us.

Sincerely,

Dan McRae

Dan McRae

Enc.

cc: William Hart
Peter Affe

AGREED AND ACCEPTED:

By: _____
Signature

June 3, 1983

Miss Anita E. Van Petten
 Attorney at Law
 MGM/UA Entertainment Co.
 18281 W. Washington Boulevard
 Culver City, CA 90230

Re: WSEK/WORLD OF MOTHER TERESA & TERESA & SPORTS ALBUM

Dear Miss Van Petten:

Fred Epstein has referred to me your letter of May 23, 1983, which returned to this office a revised set of standard terms for above referenced contracts.

Certain changes have been made in paragraphs 16 and 17 and these changes were previously discussed among us by telephone.

We have no problem with the changes made in paragraph 17. We are, however, concerned by the use of the word "re-evaluated" in the revised language to paragraph 16. We need to provide that this contract may be renegotiated if, in fact, ASCAP and BMI are at any time unable to provide our station with performance rights. Unless the decision in Buffalo Broadcasting, et al v. ASCAP, et al is either further stayed or reversed prior to February 1, 1984, blanket performance licenses will not be available through ASCAP and BMI. If this comes to pass, our stations will look to MGM/UA to provide performance clearance under the copyright laws; otherwise, the programs we have licensed from MGM/UA are useless, as they cannot be safely exhibited.

We know that music performance rights cost money and Storer does not expect a free ride. It does, however, expect MGM/UA to set up the mechanism for clearance at the source if and when the ASCAP and BMI blanket licenses are no longer available. MGM/UA is in a position to know or to ascertain the owners of copyright to music incorporated in works produced or distributed by it. Storer's stations are not in a position to obtain this information and it would be completely impractical for them to attempt individual clearance on their own.

Storer fully understands the difficulty faced by MGM/UA in predicting what will happen come February 1, 1984, but feels that the only fair thing for both parties, considering the uncertainty that prevails, is to allow renegotiation of the license agreements should the assumptions under which the contracts were entered into become no longer valid.

To sum up this long letter, if you will consent to Storer's substituting the word "renegotiated" for "re-evaluated", we are prepared to counterinitial and return the new pages to you.

Thank you for helping us work out this sticky problem.

Sincerely,

Abiah A. Church

AAC:mh
 cc. Ken Bagwell
 Joe Dimino
 Fred Epstein
 Dan Barkery



June 14, 1983



Abiah A. Church
 Vice President
 Storer Communications, Inc.
 12000 Biscayne Boulevard
 Miami, Florida 33181

Re: WSBK/"WORLD OF MOTHER TERESA" & "SPORT ALBUM"

Dear Mr. Church:

Thank you for your letter of June 3, 1983 wherein you requested that Storer be permitted to substitute the word "renegotiated" for the word "re-evaluated" in Paragraph 10 of the Standard Terms as revised and sent to you under cover of my letter dated May 23, 1983. Your proposed change is acceptable to us, and I would appreciate your altering the pages previously sent to you, counter-initialing them and returning all contracts to me.

Despite anything to the contrary contained in your June 3, 1983 letter to me, MGM/UA reserves its position with respect to the issue of music performance licenses. In the event Buffalo Broadcasting is upheld, whether MGM/UA or Storer ultimately obtains music performance licenses shall be subject to good faith negotiations.

Thank you for your cooperation.

Best regards.

Sincerely,

Anita R. Van Petten

Anita R. Van Petten
 Attorney at Law

ARVP:dkm

cc: Karla Davidson (w/encl.)
 Fred Epstein
 Stacey Valenza (w/encl.)

2000 BROADWAY BOULVARD, MIAMI, FLORIDA 33131-2710 • (305) 355-0000

MAILING ADDRESS:
P.O. BOX 91-0000
MIAMI, FL 33101-0000

May 14, 1961

NCA, Inc.,
1000 Broadway, Limited
1000 Broadway City Place
Beverly Hills, CA 91601

Re: Music Performance License

Dear Sirs:

Thank you for your letter of May 2, 1961. I am sorry to be so slow in responding, but I have been giving this matter personal attention and have been somewhat diverted by the preparation of an NRC registration Statement and our annual shareholders meeting.

I think that the language you suggest in your letter moves us along toward agreement, but falls a little short because it would still require the treatment of music performance license in a manner different from that accorded other licensees who have contributed creative elements to a film, e.g., writers, choreographers, directors, actors. We do not think that it would be any more practical for the exhibitor of a motion picture film to engage in direct negotiations with the composers and publishers of music incorporated in a sound track than for an exhibitor to be required to undertake direct negotiations with each actor for residual rights, each writer for performance rights in a copyrighted script or each choreographer with respect to performance rights in a dance number. The distributor, with direct access to the producer, is in a position to know exactly who furnished what elements of a given program and is uniquely qualified to negotiate for performing rights. There is no reason known to us why the music performance rights should not be incorporated in the license price of a program in exactly the same way as the performing rights to other elements are incorporated. We expect that inclusion of music performance rights in the price of the program will increase the price somewhat, but we also believe that if the producer purchases music rights in the competitive marketplace prior to production, the overall program price will be lower than the present system which requires the exhibitor to purchase music performance rights separately from all other program elements and in a non-competitive market.

Based upon the above rationale, we believe that the language you have suggested should be slightly modified to read as follows:

"In the event any performing rights society listed in sub-paragraph (a) above is prohibited by a final decision of a court of competent jurisdiction from granting a license to Exhibitor for performance of the music contained in said films, Exhibitor and Distributor shall negotiate in good faith between themselves to arrive at the fee (if any) to be paid by Exhibitor to Distributor for the performance of said music by Exhibitor, it being understood that Distributor will acquire and assign to Exhibitor the performance rights for any music incorporated in said films."

If the above language is acceptable to you, we will modify the NCA contracts presently being distributed and return them to you.

We appreciate the time and thought you have given toward resolving this matter.

Sincerely,

Bob
Alvin A. Church

Frank Davis
John Smith
Bill Brown
Joe Carson
Fred Nelson

MULTIMEDIA PROGRAM PRODUCTIONS, INC.

June 15, 1983

Mr. Jay Belbey
Controller
KCST-TV
8330 Engineer Road
San Diego, California 92111

Dear Mr. Belbey:

Enclosed are KCST's contracts for "DONAHUE" and "COUNTRY COMES ALIVE 3". I did not initial your new paragraph 19 for many of the same reasons that I could not agree to the other provision. The court's decision in Buffalo Broadcasting on which you're relying in requesting the change may be stayed and not take effect February 1, 1984, or it may be overturned on appeal and never take effect. Given this situation, I don't think it is appropriate, at this time, to agree to any change in obligations with regard to Music Performance Rights licenses.

I'm sure you can understand my position, but feel free to contact me if you wish to discuss the matter further.

Cordially,

Robert S. Kruetzkamp
Robert S. Kruetzkamp
Manager of Legal Affairs

RSK/ms

Enclosures



ABIAH A. CHURCH
VICE PRESIDENT
GENERAL COUNSEL & SECRETARY
JOB 756-3703

MAILING ADDRESS
P.O. BOX 811-806
MIAMI, FL 33181-0806

July 19, 1983

Mr. Robert Krutzkamp
Multimedia Program Productions, Inc.
140 W. Ninth Street
Cincinnati, Ohio 45202

Re: MUSIC PERFORMING RIGHTS

Dear Mr. Krutzkamp:

Jay Belbey, of our television station WCST-TV has asked me to write you with regard to our deletion of language in the Music Performing Rights paragraph of your standard Terms and Conditions.

The Buffalo Broadcasting Company vs ASCAP decision precludes television stations from obtaining a blanket license from ASCAP or BMI after February 1, 1984. Therefore, after that date we must look to you, the distributor, to provide performance clearance under the copyright laws. Otherwise, the programs we have licensed from Multimedia Program Productions, Inc. are useless, as they cannot be safely exhibited. We know that music performance rights cost money, and Storer does not expect a free ride. It does, however, expect Multimedia Program Productions, Inc. to set up the mechanics for clearance, if and when the ASCAP and BMI blanket licenses are no longer available. Multimedia Program Productions, Inc. is in a position to ascertain the owners of copyrights, and the music incorporated in works produced or distributed by them. Storer's stations are not in a position to obtain this information, and it would be impractical for them to attempt individual clearance.

Storer fully understands the difficulty faced by Multimedia Program Productions, Inc. in predicting what will happen as of February 1, 1984. However, your standard music performing paragraph is unacceptable, since it contains assumptions which will not be valid after that date. It is for this reason we substituted our indemnification paragraph which incorporated the issue of Music Performing Rights (Number 19 in the agreement.) For your review and approval, I have enclosed two alternative paragraphs, either of which would be acceptable to us, to resolve the problem.

We appreciate the time and thought you have given towards resolving this matter and would appreciate your reply at your earliest convenience.

Very truly yours,

Abiah A. Church

AAC:bt

Enc.

cc: Jay Belbey

STORER
COMMUNICATIONS INC.

12000 BISCAYNE BOULEVARD, MIAMI, FLORIDA 33181-2710 • JCS 888-1000

ABIAH A. CHURCH
VICE PRESIDENT
GENERAL COUNSEL & SECRETARY
608 788-3703

MAILING ADDRESS
P.O. BOX 8118000
MIAMI, FL 33181-8000

July 31, 1983

Edward Gilbert, Esq.
Secretary/General Counsel
ITC ENTERTAINMENT, INC.
115 E. 87th Street
New York, NY 10022

Re: WJBE-TV/CINEMA 13

Dear Mr. Gilbert:

Thank you for your letter of July 29, 1983. Although you or Buffalo case is currently on appeal, as of today, the Feb has not been extended. Until such time that it is, we the date that our interim ASCAP/BMI licenses will takes place, we would be unable to exhibit your contained within them had been properly cleared for pr concern with our agreement with your company is the years.

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You are correct, and I can assure you, that we are expecting a "free ride" regarding the cost of obtaining our licenses. On the other hand, since none of the syndicators, including your company, have given us any indication of what the cost may in fact be, we agree to assume those costs. I am sure you understand that when we agree to purchase this package, it was based on certain costs and we of the package was significantly greater, than maybe WJBE would have chosen not to buy it.

as is expecting a
licenses. On the
company, have given us
agree to assume those
to purchase this
of the package
an not to buy it.

I was disappointed that you have now turned down three alternatives which we have proposed in good faith to resolve this matter, without proposing your own alternative. Clearly, we must have some language that will deal with the Buffalo issue, to protect my client as well as yours.

We have now come to agreement with MGM/UA and Twentieth Century Fox regarding this matter. We are currently proceeding with the other major syndicators, and I feel confident we will also come to an agreement with them. I would like to come to an agreement with your company, and respectfully suggest you propose an alternative to deal with this issue.

I will await further word from you regarding this matter. I must advise you that if we cannot resolve this issue which in all sincerity I believe we can if we both intend to do so I will advise my client to reconsider the purchase of this package. Obviously, a final decision as to purchasing your product is purely a business one. I cannot predict what that decision will be, but I can assure you that this issue is of utmost importance to our company, and it has been our policy to only enter into agreements which address the Buffalo case appropriately.

Thank you for your continued cooperation in this matter.

Very truly yours,

Abiah A. Church

AAC:ld
cc: Marianna Masar

FREDRIC E. EPSTEIN
ATTORNEY

GGN 758-3708

August 18, 1983

MAILING ADDRESS
P.O. BOX 81-8004
MIAMI, FL 33181-80

Mr. Myron Dubow
Columbia Pictures Television Distribution
15350 Ventura Boulevard
Sherman Oaks, California 91403

Re: Music License Language

Dear Myron:

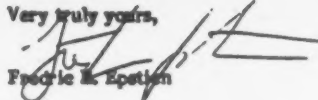
The following would be acceptable language to be included in all our contracts for our television stations concerning the music performance issue:

Notwithstanding anything to the contrary contained in the Agreement, any obligation of Licensee to secure performing rights licenses necessary for the telecast of music contained in any picture and to indemnify and hold Licensor harmless from any liability regarding the licensing of the rights, is expressly subject to the final judgment and order from which no appeal can be taken in Buffalo Broadcasting Company, Inc. et al. vs American Society of Composers, Authors and Publishers, et al. and Broadcast Music, Inc., et al. 546 F. Supp. 274 (SDNY 1982).

The parties agree that this contract may be renegotiated if at any time a court order becomes effective which makes a blanket performance license from ASCAP or BMI unavailable, unless Licensor itself provides performance licenses required for play of any music contained within the program(s).

If this is satisfactory to you, then I believe we have come to an agreement as to all changes in all syndication agreements now pending for our television stations. I would appreciate if you would incorporate this as well as the other changes we discussed and send out new complete sets of agreements for all stations that are currently held up, so we can expedite the signing and payment of any monies due Columbia. I appreciate your cooperation in this matter. Please contact me if you have any further questions.

Very truly yours,


Fredric E. Epstein

FEE:gg

cc: Abiah A. Church
Sue Green
Candace Fisher
Marlynda Salas

STORER
COMMUNICATIONS-INC

18000 BISCAYNE BOULEVARD, MIAMI, FLORIDA 33181-2710 • (305) 888-1

FREDRIC E. EPSTEN
ATTORNEY
305 758-3708

MAILING ADDRESS:
P.O. BOX 81-801
MIAMI, FL 33181-8

August 17, 1983

Mike Blumenthal
MTM Productions
4024 Radford Avenue
Studio City, CA 91604

Re: Music License Language

Dear Mr. Blumenthal:

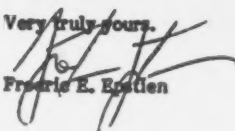
Jim Victory recently spoke with Bob Church, our General Counsel, regarding the music license issue. Bob and Jim agreed that we would draw up some language, which would be acceptable to Storer to deal with the issue in our current contracts. He has asked me to submit it to you for your approval.

Notwithstanding anything to the contrary contained in the Agreement, any obligation of Licensee to secure performing rights licenses necessary for the telecast of music contained in any picture and to indemnify and hold Licensor harmless from any liability regarding the licensing of the rights, is expressly subject to the final judgment and order from which no appeal can be taken in Buffalo Broadcasting Company, Inc. et al. vs American Society of Composers, Authors and Publishers, et al. and Broadcast Music, Inc., et al., 546 F. Supp. 274 (SDNY 1982).

The parties agree that this contract may be renegotiated if at any time a court order becomes effective which makes a blanket performance license from ASCAP or BMI unavailable, unless Licensor itself provides performance licenses required for play of any music contained within the program(s).

Please contact me at your convenience so we can discuss and consummate this matter. For your own information, we are specifically concerned with the program WKRP in Cincinnati, which we purchased from Victory Television. Look forward to speaking with you soon.

Very truly yours,


Fredric E. Epstein

FEE:mr
cc: Jim Victory
Bob Church

STORER
COMMUNICATIONS-INC

12000 BISCAYNE BOULEVARD, MIAMI, FLORIDA 33181-2710 • (305) 888-1000

FREDRIC E. EPSTEIN
ATTORNEY
(305) 756-3708

February 16, 1984

MAILING ADDRESS:
P.O. BOX 81-8000
MIAMI, FL 33181-8000

Ms. Irene Mizwinski, Director
Business Affairs Administration
Viacom Enterprises
1211 Avenue of the Americas
New York, New York 10036

Re: License Agreements with Storer Stations

Dear Ms. Mizwinski:

I am in receipt of your letters to our Stations in Boston and San Diego regarding changes we have made in your standard license agreements. The two paragraphs which gave Viacom concern were those referenced to music licensing and unsuitability for broadcast.

With regard to unsuitability for broadcast, the proposed paragraph which was in our previous San Diego contract, is acceptable with the deletion of the referenced Television Code of the National Association of Broadcasters which, of course, is no longer in existence. We were surprised at your failure to accept our paragraph concerning music licensing. The identical language has been accepted by Columbia Pictures and Telepictures. Although I enjoyed reading your review of the Buffalo Broadcasting case, I strongly disagree with the implications as well as its conclusions. The Federal Court did not intentionally leave the matter of programs "in the can" unresolved but left that matter for later consideration.

As to the matter of the obligation to secure performing rights licenses as opposed to reasonable payment for such licenses, I would suggest you again review Judge Gagliardi's Decision in Buffalo Broadcasting concerning this important issue. The Decision is clear, as broadcasting stations are in no way, shape, or form in a position to obtain performing licenses for the music in syndicated programs, since the broadcast stations have nothing to do with the choice of music in such programming. Neither the broadcast industry nor Storer

has ever represented that it would not pay a reasonable cost for the actual music used in syndicated programming as opposed to a percentage figure of its total gross revenue regardless of the amount of syndicated programming actually exhibited. Nothing in the case implies that once the interim licenses of ASCAP/BMI expire that television stations will take steps to secure the rights. On the other hand, the Decision is very clear that either ASCAP/BMI come up with a more realistic way for stations to pay for music in syndicated programming directly proportionable to the programming it purchases which contains music, or that distributors, producers and syndicators obtain this right at the source when packaging a particular film or program, which would increase the price of the product purchased by the television station to some reasonable degree.

I do not wish to venture into a lengthy correspondence concerning the Buffalo Broadcasting case. I enclose two alternatives, one from Warner Brothers and one from MGM/UA concerning the music license issue which has been placed in all our current license agreements. Storer requires actual language in the contract to address the issue and either of the proposals enclosed or the prior proposal will be acceptable to us. If you have alternative language you would like to propose, please send it to me and we will consider it and attempt to resolve this as soon as possible.

If you have any other questions, please do not hesitate to contact me.

Very truly yours,

Fredric E. Epstein

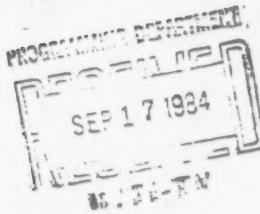
FEE:bt

Enc.

cc: Jay Belbey
Marianne Mazer
Candice Fisher

ATTN: FRED EPSTIEN

Irene Mizwinski
Director
Business Affairs Administration



September 13, 1984

Ms. Sue Green
WITI-TV
9001 N. Green Bay Road
Milwaukee, WI 53209

Re: Family Feud - Strip V

Dear Sue:

I understand from our Financial Department that you are withholding payment for the above captioned series, due to the fact that you do not have an executed license agreement.

As you know, Sue, the program order dated February 10, 1984 has been signed by your station with your Legal Department's approval on April 19, 1984. Furthermore, the program order states that "Pending preparation and execution of a Program License Agreement between us, this order shall be considered a firm and binding agreement between us, pursuant to which Viacom will deliver the above programs as set forth herein and station will pay the license fee set forth herein in the manner described."

I would appreciate your cooperation in making payment. You are considered an important and valued customer of Viacom's.

The execution of the agreement is being held up for the following reasons:

1. Paragraph 21 - Cuts and Alterations

As we can only agree to the language regarding compliance with the NAB Code and the rules and regulations of the FCC, we would like to delete the words "Licensee's standards of good taste."

2. Paragraph 24 - Publicity

We cannot agree to the language regarding the rights to publicize the names and likenesses of the players.

Viacom Enterprises 1211 Avenue of the Americas, New York, N.Y. 10036. Tel. (212) 573-5175

3. Paragraph 26 - Unsuitability for Broadcast

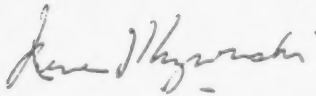
This paragraph must be deleted. Viacom in its agreement with producers does not have the right to reject the programs.

4. Paragraph 27 - Buffalo Broadcasting Company, Inc. et al v. American Society of Composers, etc.

We would like to delete this paragraph subject to any final judgement following all appeals entered in the Buffalo Broadcasting Case, United States District Court, Southern District of New York.

I would like to add that the above paragraphs have been deleted in the past by the Legal Staff of Storer. May I hear from you at your earliest convenience in order to have the Program License Agreement executed.

Sincerely,



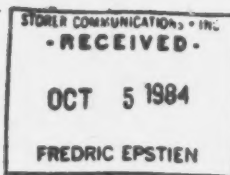
IM:bkt

FOX LETTER QUOTED ON PAGE 4
OF EPSTIEN WRITTEN SUBMISSION
OF APRIL 9, 1986

October 3, 1984



Frederic E. Epstein, Esq.
Storer Communications, Inc.
12000 Biscayne Boulevard
Miami, FL 33181-2710



Benson H. Begun
Vice President
Business Affairs

Dear Mr. Epstein:

Our records indicate that we have three outstanding unsigned license agreements with Storer stations as follows:

WSBK-TV	Boston, MA - BATMAN
WTVG-TV	Toledo, OH - TRAPPER JOHN
KCST-TV	San Diego, CA - Century Eleven Features

We have written to the program managers at the stations with respect to various changes they have made in the agreement, but thought it appropriate to contact you directly with respect to the music performing rights issue.

Neither the rider dealing with indemnification nor the three language proposals you have agreed to with other syndicators is acceptable to us.

I do not know why Storer cannot execute any further syndication agreements with Fox without having appropriate language in place concerning the Buffalo case.

As you are no doubt aware, on September 14, 1984, the United States Court of Appeals for the Second Circuit unanimously reversed the decision of the District Court reaffirming the validity of the historic practice of television stations obtaining blanket licenses from ASCAP, BMI, etc.

Even in the event that the U.S. Supreme Court reviews the case and reverses the Court of Appeals, it is clear that there will be no effect on the blanket licensing by stations of the performing rights for music contained in programs covered by pre-existing agreements.

In the unlikely event of a Supreme Court reversal, we are prepared to discuss the impact on future agreements. However we re-affirm our belief that the outstanding agreements should be promptly put to bed without the necessity of presently negotiating the remote possibility of the impact of a reversal on future license agreements.

If you have any questions or wish to discuss the matter in further detail, please feel free to call me.

Sincerely,

Benson H. Begun

BHB/cjs

August 29, 1985

Mr. Stanley DeCovnick
20th Century-Fox Television
P. O. Box 900
Beverly Hills, CA 90213

Dear Mr. DeCovnick:

Enclosed is our check for the amount of \$78,900.00. We are sending you this check as payment for the license fees and library prints for the Century X movie package as invoiced from March 17, 1984 to August 3, 1985. Charges for library prints on your invoices of May, June and July of 1985 have been changed to reflect the price of \$475 per print as originally agreed.

This payment in no way acknowledges the terms of the 20th Century-Fox Television Syndication License Agreement. As we have stated in the past, we expect 20th Century-Fox to do everything in its power to provide programming to WITI with music cleared at the source. We expect that any new programming that you desire WITI-TV to purchase in the future will come to us with music cleared at the source. If not, we may not be able to purchase the programming. Of course, we are not singling out 20th Century-Fox and we are making the same request to all our suppliers and are confident we can work it out to our mutual satisfaction. We are willing to pay a reasonable additional cost to obtain programming which has music cleared at the source.

If you have any questions, please let me know.

Cordially,

Kathryn Koenen
Program Manager

KK/ag

CC: Andrew P. Potos, Vice President & General Manager
Raymond E. Engelhart, Business Manager
James A. Kurz, Controller

October 17, 1985

Mr. Stanley DeCovnick
20th Century-Fox Television
P. O. Box 900
Beverly Hills, CA 90213

Dear Mr. DeCovnick:

Enclosed is our check for the amount of \$4,225.00. We are sending you this check as payment for the license fees and library prints for the Century X movie package as invoiced from September 28, 1985 to October 5, 1985. Charges for library prints on your invoice #110347 dated September 28, 1985 have been changed to reflect the price of \$475.00 per print as originally agreed.

This payment in no way acknowledges the terms of the 20th Century-Fox Television Syndication License Agreement. As we have stated in the past, we expect 20th Century-Fox to do everything in its power to provide programming to WITI-TV with music cleared at the source. We expect that any new programming that you desire WITI-TV to purchase in the future will come to us with music cleared at the source. If not, we may not be able to purchase the programming. Of course, we are not singling out 20th Century-Fox and we are making the same request to all our suppliers and are confident we can work it out to our mutual satisfaction. We are willing to pay a reasonable additional cost to obtain programming which has music cleared at the source.

If you have any questions, please let me know.

Cordially,

Kathryn Koenen
Program Manager

KK/sq

CC: Andrew P. Potos, Vice President & General Manager
Raymond H. Engelhart, Business Manager
James A. Kurz, Controller

Senator MATHIAS. Now, since we have combined this panel, I am going to ask Mr. Valenti to go right ahead, or Mr. Blumenthal, whichever wants to go first.

STATEMENT OF MEL BLUMENTHAL

Mr. BLUMENTHAL. Mr. Chairman, members of the subcommittee, I am the executive vice president and one of three principal shareholders of MTM Enterprises, Inc. As you may know, it is a privately owned independent television production company which focuses on developing television programs of the highest quality possible.

The company currently produces five programs for network prime-time broadcast: "Hill Street Blues," "St. Elsewhere," "Remington Steele," "Newhart," and "Mary." In addition, the following are among our shows in syndication, including: "The Mary Tyler Moore Show," "WKRP in Cincinnati," "Lou Grant," and the original "Bob Newhart Show."

I think it is important that the subcommittee understand how the present system for the licensing of music performance rights permits producers and composers the maximum flexibility in developing quality music for television, and how S. 1980 would drastically alter this system, stifling the freedom of both producers and composers to search for the best possible creative match.

Music has historically played a very important role in our programming. While some theme songs automatically come to mind when you think of television music, it is important to remember that music is used throughout our programs for character development, advancing the plot line, and creation of moods.

A classic example is "St. Elsewhere." In that program, not only is there a recognizable and popular theme song composed by Dave Grusin, but the various doctors' personalities are characterized by their own signature music. They choose the music they would like to listen to in the operating room. Dr. Craig prefers uplifting classical music, while Dr. Caldwell prefers soft rock, and he finds that more soothing.

Under the current blanket system for television programs, composers receive a modest up-front fee from the producer to write the theme and background music for a show. When this music is aired on a network or when subsequent episodes beyond the pilot are aired, composers receive additional compensation from the performing rights society to which they belong from the networks' blanket license. However, the composers receive substantial revenues if and when their programs reach the syndication market.

MTM's contractual arrangements with composers are almost always on a work-for-hire basis. Our programs result from the true creative collaboration between producers and composers and we have the freedom to search the marketplace for the most appropriate and viable music for our shows. Our range of choices include both highly acclaimed composers, such as Henry Mancini, Mike Post, who you heard from, Hal David, Burt Bacharach, Paul Williams, Mel and Allen Bergman, as well as relatively new and upcoming composers. We are able to attract such talent at these fees because the current copyright law permits composers to continue

to share in revenues as the programs are broadcast and rebroadcast on television stations throughout the world.

These continuing payments become an annuity for them. I believe that S. 1980 would severely retard the use of quality music in television programs. MTM would be forced to pay enormous up-front composing fees thereby dramatically escalating the production budgets which are now causing substantial and program threatening deficits.

For example, each episode of "Hill Street Blues" this current season that we are in now cost MTM \$450,000 more than NBC, the network that buys it and pays for them. In order to recoup this deficit and make a profit, "Hill Street Blues" must be successfully sold in syndication. You should know, however, that the chances that a show will survive from the pilot stage through the 3 to 5 years required before a series is marketable in syndication are extremely slim. And even in today's competitive syndication market, there is no guarantee a show will be successful.

If the current system of blanket licensing is eliminated, we will have to use less original music, look more to foreign composers who will work for a lower fee; look to more foreign prerecorded music tracks, and to preexisting public domain themes and compositions as a means of finding affordable music for our shows.

I feel very strongly that any of these measures would compromise the quality of our shows and destroy the television production industry's ability to nurture, develop, and support both successful and newly discovered composers.

S. 1980 can only spell disaster for composers. Without their continuing revenue stream, composers will no longer find it attractive to write original music for television. Moreover, if producers could design a system that would compensate composers on a continuing basis for the use of their work, I seriously question whether it could ever be as efficient a system as ASCAP, BMI and SESAC currently have.

S. 1980 also falls short when consider the viewing public. This bill would mean less music of lower quality and less diversity. Please do not force upon us a system which limits creativity just at a time when music is really coming of age on television. We are seeing a trend toward the more innovative use of music in programming, such as in "Miami Vice," "Hill Street Blues," and "St. Elsewhere."

While no station has yet approached us to enter into a source licensing negotiation, given the competitive nature of today's syndication market, I would certainly give serious consideration to any reasonable proposal. S. 1980 is not reasonable. It mandates a specific business plan with no means of implementing that plan.

For example, how should MTM place a value on music before the program has proved to be a success or failure? How does this affect existing syndication contracts or those which are currently being negotiated? MTM will have to develop and implement a plan to monitor the use of music in its shows. Will producers have to police the market for copyright violations? Will we be liable for those infringements?

In conclusion, if this legislation is passed, I believe the producers, like MTM, and the very talented composers with whom we work,

and the viewing public will all suffer. We will be forced to look for short cuts or risk free approaches to music which will ultimately diminish the quality of our shows.

I urge you to oppose S. 1980 as a positive stand for the enhancement of quality television programming.

Thank you.

[Statement of Mr. Blumenthal follows:]

PREPARED STATEMENT OF MEL BLUMENTHAL

Introduction

Mr. Chairman, members of the Subcommittee, I am the Executive Vice President and one of three principal shareholders of MTM Enterprises, Inc., which is a privately-owned independent television production company. MTM, which has been in operation since 1969, takes great pride in its independent status. We focus on developing television programming of the highest quality possible.

The company currently produces five programs for network prime-time broadcast: "Hill Street Blues," "St. Elsewhere," "Remington Steele," "Newhart," and "Mary." In addition, the following are among our shows in syndication: "The Mary Tyler Moore Show," "WKRP in Cincinnati," "Lou Grant," "Rhoda," "The White Shadow," "The Tony Randall Show," "Phyllis," and "The Bob Newhart Show." "Hill Street Blues," "St. Elsewhere," "Newhart," and "Remington Steele" are, or will soon be, licensed for broadcast in syndication starting as early as the Fall of 1987. Many of our programs, including "The Mary Tyler Moore Show," "Rhoda," "Lou Grant," "The White Shadow," "WKRP in Cincinnati," "Hill Street Blues," and "St. Elsewhere," have won numerous Emmy awards and other prestigious honors, such as the Peoples' Choice Award, the George Foster Peabody Award, and the Humanitas Award.

I think it is important that the Subcommittee understand how the present system for the licensing of music performance rights permits producers and composers the maximum flexibility in developing quality music for television. S. 1980 would drastically alter this system and stifle the freedom of both producers and composers to search for the best possible creative "match." Perhaps the most effective way to illustrate my point is to describe the role of music in some of MTM's shows and our relationships with the various composers involved in these efforts.

The Role of Music in MTM Programs

A. Nature of Music Use

Music has historically played a very important role in our programming. The theme song from "Hill Street Blues," for example, has received tremendous critical and popular acclaim -- in fact, its composers, Mike Post and Pete Carpenter, won a Grammy for it. While theme songs automatically come to mind when you think of television music, it is important to remember that music is used throughout our programs. Background music is used for character development, advancing the plot line, and creation of moods.

A classic example of the integral role music plays in our programs is "St. Elsewhere." In that program, not only is there a recognizable and popular original theme song composed by Dave Grusin, but various doctors are characterized by their own "signature" music. The show's doctors choose the music they would like to listen to in the operating room -- Bill Daniels (Doctor Craig) prefers uplifting classical music while Mark Harmon (Doctor Caldwell) found soft rock more soothing. As such, music plays an important role in developing the personality of the "St. Elsewhere" characters.

Music is also extremely important in creating a mood. I would venture to say that a "Remington Steele" chase scene would be far less exciting or a romantic moment between Remington and Laura far less evocative without Henry Mancini's music to create the mood. And it is difficult to imagine the "Newhart" show without Henry Mancini's theme which accompanies vivid and beautiful scenes of the Vermont countryside.

B. Relationships with Composers

Under the current blanket license system for television programs, composers receive a modest up front payment from the

producer to write theme and/or background music for a show. When the theme song or other music is aired on a network pilot or subsequent episodes, composers receive additional compensation from the performing rights society to which they belong from the networks' blanket license. However, composers receive substantial revenues if and when their program reaches the syndication market. For composers, the more times their music is played, the more money they receive.

MTM's contractual arrangements with composers are almost always on a "work-for-hire" basis. Typically, we will pay a modest composing fee of \$3,500 - \$5,000 for the theme song and background music on a half-hour pilot, \$7,500 - \$10,000 for the theme and background music on a one-hour pilot, and \$1,000 - \$5,000 for background music on each episode, depending on the length of the show and the amount of music which is required to be composed. Our programs result from true creative collaboration between producers and composers, and we have the freedom to search the marketplace for the most appropriate and viable music for our shows. Our range of choices includes both highly acclaimed composers such as Henry Mancini, Mike Post, David Rose, Dave Grusin, Bill Conti, Burt Bacharach, John Williams and Alex North, as well as relatively new and upcoming composers.

We are able to attract such talent at these fees because of the current copyright law which permits composers to share in revenues as the programs are broadcast and rebroadcast on television stations throughout the world. These continuing payments become an annuity for them. If this revenue stream is eliminated as proposed by S. 1980, composers will no longer find it attractive to write original music for television. In addition, publishing companies which also share in performance revenues will no longer have the incentive to devote their time and resources to the exploitation of television music.

To sum up, the present system of blanket licensing permits us to create the best production and music package feasible -- it focuses on quality.

C. Promotion of Music

MTM has two music publishing subsidiaries: MTM Music, Inc., which is affiliated with ASCAP, and Mimsey Music, Inc., which is affiliated with BMI. Music publishers have the expertise and facilities necessary to promote and exploit the music which is composed for use in MTM's television shows. These publishing companies furnish financial support to production companies and composers by way of advances and guarantees and, they also furnish valuable and essential advice and consultation as to the commercial viability of the many different musical styles and forms so that our programs will contain the most popular and innovative of such musical styles and forms.

It is important to understand that, because music is a severable component of our television productions, the publisher's role is, in conjunction with the composer, to promote and exploit that music in other media such as phonograph records, feature films, live musical performances, radio airplay, and use on other television programs. For example, several different versions of the "St. Elsewhere" theme have been recorded and are currently being played on radio stations across the country. The "Hill Street Blues" theme has also been recorded by several different artists such as Mike Post and Rodney Franklin. Mike Post's recording became a major national hit recording which rose to the top of the Billboard and Cash Box record charts and Rodney Franklin's recording rose to the top of the jazz charts. These recordings are still heard daily around the world on radio and television, as well as on elevators, in business offices and other public places through its inclusion in background music services. These theme songs are licensed for print publication in many versions -- for schools and professional and amateur

bands and orchestras, and in easy learning editions for children and adults who are learning the piano and other instruments. They are also licensed for use in documentary films, educational films, safety films and public service announcements.

My point here is that the music publisher plays a vital role in promoting and exploiting the use of television music in other media -- a role for which the production company and composers have neither the expertise, finances nor time, due to the continued demand to develop new programming and to create new music for such programming.

Music Source Licensing Legislation Would Restrict Producers' Choices and Diminish the Quality of Music in Television Programming

I believe that S. 1980 would drastically change the way producers do business, with the ultimate effect of severely retarding the use of quality music in television programs. MTM would be forced to pay enormous up front composing fees which, in many cases, will be double or triple what is now paid, thereby dramatically escalating the production budgets which are already causing substantial and program-threatening deficits. For example, each episode of "Hill Street Blues" this season costs \$450,000 more than NBC pays us in license fees, and next season that deficit will rise to more than \$500,000 per episode. In order to recoup this deficit and make a profit, "Hill Street Blues" must successfully be sold in syndication. Under the current system, both we and the composers take our chances in the market.

To give you an idea of how difficult it is for a program to succeed in the syndication market, I refer you to an article in the March 17, 1986 issue of Broadcasting which describes the chances of a presentation of a pilot idea being accepted by a network and surviving to a second season as 750 to 1. Remember, however, that a show must air for at least three to five seasons before becoming marketable in syndication. And even then, the program may not do well -- some of our programs have been syndicated in only 50 markets

and we have never recouped our losses, while others have sold in 160 markets and have made enough money to cover deficits and make a profit.

In addition, the syndication market has undergone tremendous changes in the last year. It is now, and for the foreseeable future, a buyer's market. There is simply not enough broadcast time during which to air the multitude of shows available in syndication. This situation only imposes more risks on producers. As it stands, producers and composers have to wait several years to really see the fruits of their labor. By contrast, broadcasters receive a return on their investment on a very current basis through the receipt of advertising revenues.

If the current system of blanket licensing is eliminated, we will use less and less original music in television shows because we will not be able to afford quality composers. The program production budgets will not be able to absorb the significant increases in performance fees to composers that would have to be paid up front to offset their loss of performance rights income. A change in this system will cause us to look more and more to foreign composers who will work for lower fees, to foreign prerecorded music tracks and to preexisting public domain themes and compositions as a means of finding affordable music for our shows.

For example, the quality of the music used on "Bill Street Blues" might not have been nearly as high had we been forced to source license as would be required under S. 1980. While MTM will always be a company that seeks to produce high quality programming, the substantial increase in up front initial music costs would have forced us to make changes and take shortcuts when it comes to music. Because of already heavy deficit financing burdens, we would not have been able to afford to hire a composer such as Mike Post to write the music for the series; instead, we may have looked to preexisting public domain music or to foreign compositions. In addition, we might have had to cut back on the amount of music used

in our programming. I feel very strongly that any of these measures would compromise the quality of music in our shows as well as the shows themselves and destroy the television production industry's ability to nurture, develop and support the diverse group of successful and newly discovered composers.

Impact of S. 1980 on Others

S. 1980 can only spell disaster for composers. It removes the incentive to create music for television. Talented composers want to create good music, but they also want to make a living doing it. Television will no longer provide the opportunity for promising careers if this legislation is passed. Even if we could design a system that would compensate composers on a continuing basis for the use of their work, I seriously question whether it could ever hope to be as creatively and cost efficient a system as ASCAP, BMI and SESAC currently have in place. This is a tremendous burden to impose on producers, particularly small independents. I also ask, "What is the sense in creating a system that would be duplicative of the present one?" The performing rights societies are not going to disappear -- they will continue to license music in other media.

S. 1980 also falls short when you consider the viewing public. This bill would mean less music and music of a lower quality and less diversity. Producers would no longer have the maximum freedom they have now to seek out the best music from a variety of sources. Please do not force upon us a system which retards creativity just at a time when music is really coming of age on television. We are seeing a trend toward more innovative use of music in programming such as in "Miami Vice," "Hill Street Blues," and "St. Elsewhere." The technological development of stereo TV will only enhance the possibilities and demand for television music in the future.

There is No Need for This Legislation

The current system makes available a number of options. The broadcasters themselves have focused on the blanket license as the most efficient and effective system for them. I question why the broadcasters should ask Congress to restrict marketplace choices to one untested method, rather than allow some level of choice.

While no station has approached us to enter into a source licensing negotiation, given the competitive nature of today's syndication market, I would certainly give serious consideration to any reasonable proposal that would afford our composers, our publishing companies and our production company benefits similar to those received under the current system of blanket licensing. The proposed legislation does not afford such benefits. Instead, it proposes a business plan, with no means of implementing that plan. For example, how should MTM place a value on music before a program has proved to be a success or a failure? Can this be done in a way that is fair to composers without inevitably sinking MTM further into deficit? How does this affect existing syndication contracts, or the syndication agreements which are currently being negotiated? Will MTM have to develop and implement a plan to monitor the use of music in its shows? Will producers have the responsibility of policing the market for copyright violations? Will we be liable if such infringements do occur?

Under the proposed legislation, there is no way broadcasters will adequately compensate composers, publishers and production companies without a separate licensing mechanism such as the current performing rights blanket license. The broadcasters, with their enormous market power, will merely cause the program producer and supplier to absorb the full cost of music when the show is sold for syndication, and he will pay no more for such programming than he now pays. However, he will have very substantially reduced or quite probably eliminated all of his music costs thereby leaving composers, publishers and production companies without the essential

revenue stream necessary to develop, nurture and support the creative use, promotion and exploitation of music as discussed above.

Conclusion

If this legislation is passed, I believe that producers like MTM, the very talented composers with whom we work, and the viewing public will all suffer. We will be forced to look for short-cuts or risk-free approaches to music which will ultimately diminish the quality of our shows.

I urge you not to allow the quality of television to be further diminished and request that you oppose S. 1980 as a positive stand for the enhancement of quality programming.

Senator MATHIAS. Thank you very much.

Mr. Valenti, it looks like you are the grand finale.

STATEMENT OF JACK VALENTI

Mr. VALENTI. I am going to stand, Mr. Chairman.

Let me begin by saying that Winston Churchill once rose in the Commons to confront a question, an issue put forward by a fellow member, a plan that Mr. Churchill found to be eminently unsound. He said the following: "I have examined the plan and the mind of the right honorable gentleman and I am bound to report that there is nothing there in either place."

I have repeatedly examined the bill that is under consideration before this committee and the clamorings of the broadcasters in making their case for passage. I am bound to report there is nothing there in either place.

If I had to capsule with one word the case that the broadcasters are making before this Congress, it would be the word "chutzpah," which is a deliciously ripe Yiddish word that means the most outrageous display of nervy gall.

The fact is the broadcasters have no case, absolutely none. I lament broadcasters not being on this panel because I would like to proffer to them some questions whose answers you would like to have forthcoming.

What is the public interest in this bill? Is there any? Is it in the public interest to collapse and dismantle a system for music licensing that has worked for 40 years? That is a serious question for Congress. The answer is there is no public interest in this bill. If there is one, the broadcasters have been uncharacteristically shy in making it visible.

If this bill passes, who are the sole beneficiaries? We ought to look at that. Not the public because they would soon grow dissatis-

fied with the lower quality of music. Surely not the composers because they are going to be fatally injured. Then who benefits? It is broadcasters.

The sole purpose of S. 1980 is to let broadcasters pay less for the music they now receive. But we may say wait a minute. Are not television station owners in dire financial straits? The answer is, of course they are. They only make 30 to 40 percent profit margins on their sales today. The only other enterprise in America that can match that is to win a lottery. Of course they are. They pay one cent out of every net revenue dollar for their music, one cent out of every dollar, which means that if you pay ASCAP \$1,000 a month, you are making \$100,000 a month. Of course they are. At \$10,000 a month, a hundred times that is \$1 million a month.

Now, one other thing perhaps. Well, what about station sales. Well, obviously, the broadcasters have a point there because they are being sold for paltry sums of a half billion dollars a station, with pitiful figures like \$200 to \$300 million for other sales. The fact is, gentlemen, that in the world of selling television stations today, there is no such thing as Gramm-Rudman-Holling. You can be sure of that.

Is it not true that, even as I plod along this morning, that there is in the courts a debate going on under Federal Court supervision, negotiations that would be implemented under the direction and the supervision of a Federal court? Should the Congress intrude upon that when all the so-called options for broadcasters are very much alive. This is the way this system is operated.

But let me be fair. Perhaps the broadcasters do have a point. They are advocating what they call a free market solution. But is that so? If it is so, why does this bill mandate only one way to license music when, no matter what these gentlemen and the others said, there is in evidence today, and the courts have corroborated it, four separate ways to license your music. Yet, under this bill, the broadcasters will shrivel and shrink the marketplace. I do not consider that a free market.

Now, what then would you call this bill? If none of the assets I have outlined is contained within the broadcast, it is a private relief bill for broadcasters, Mr. Chairman. That is what it is, a governmentally ordered low cost, higher profits for broadcasters which brings nervy gall to a new level of artistry, believe me.

But the ultimate irony is that the broadcasters have ways to fight here in Washington, asking and receiving massive deregulation of their business, culminating in the FCC's recent decision to relax the so-called multiple ownership rules which allows owners of broadcast groups to have more stations than was once allowed. That is deregulation. Yet they come to you under their special pleadings and say we want this bill, which is our special broadcaster bill, which makes us regulate in a very strict and straightjacketed way how music is licensed. It is a contradiction that boggles the mind.

I think the least broadcasters can do is to open up to the indisputable fact that there is no public interest in this bill, absolutely none. No benevolence to it. Leave aside their pious lamentations which at no point connect to the heart of the issue. The heart of

the issue is simply money. Broadcasters want to pay less money for what they receive.

Finally, I have listened, sometimes patiently and sometimes impatiently, to what has been said today. I want to sum up my testimony by quoting the words of Socrates in his trial. His words are particularly apt today, and at least they convey to you what I think this whole proceeding is all about.

At the end of the trial, Socrates said to the jury: "I do not know what effect my accusers have had upon you. But for my part, I am much carried away by them, so convincing are their arguments. But, on the other hand, scarcely a word of what they have said is true."

The jury believed his accusers and put Socrates to death. If you go along with broadcasters, you are going to put to death one of the most effective systems for licensing music, the least transaction cost you can possibly imagine for what I consider to be scarcely a word of what has been said is true.

[Statement of Mr. Valenti follows:]

PREPARED STATEMENT OF JACK VALENTI

Mr. Chairman, and Members of the Subcommittee:

My name is Jack Valenti.

I am President and Chief Executive Officer of the Motion Picture Association of America, Inc. (MPAA) MPAA's members are among the leading producers and distributors of motion pictures and television programs in the United States. The member companies of MPAA are:

Columbia Pictures Industries, Inc.

Walt Disney Productions

De Laurentiis Entertainment Group, Inc.

MGM/UA Entertainment Company

Orion Pictures Corporation

Paramount Pictures Corporation

Twentieth Century Fox Film Corporation

United Artists Corporation

Universal City Studios, Inc.

Warner Bros. Inc.

Mr. Chairman, a number of television broadcasters are urging the Congress to pass S. 1980, and its companion bill in the House, H.R. 3521.

The broadcasters have no case. None.

All one has to do is ask the broadcasters some simple questions, and their house comes crashing down:

What is the public interest in dismantling a system that has worked (and is still working) for about 40 years?

If this bill is passed, who benefits? Is it not true that the only reason this bill has been offered is to reduce what television stations pay for their music?

Is it not true that even as this bill is debated, the TV stations are in court -- right now -- seeking new license rates?

Is it not true that the burden in the court falls on ASCAP to prove the reasonableness of the rates before the court?

Why should Congress insert itself into a functioning marketplace, when at this very moment a rate proceeding is pending in a federal court?

Why?

Therefore, let us get it straight:

The broadcasters' motive for pushing this bill is crassly economic. They ought to own up to that indisputable fact without the pious lamentations they offer, none of which connect to the heart of the issue.

There is nothing benevolent in their purpose.

There is no public interest in their objective.

There is no weight to their arguments.

Simply put, the measure before you is nothing more than a private relief bill -- it would thrust the government, in an unwarranted and unnecessary manner, into a free and functioning marketplace on behalf of powerful and profitable broadcasters.

S. 1980 would dictate a single way of doing business. It would replace the current open marketplace with a closed one. It would work a shocking, intrusive and unfair change in the way business has been done for decades.

The ultimate irony in the broadcasters' call for government regulation of the music rights marketplace is that the broadcasters have sought and won expansive deregulation of their own business practices, such as the relaxation of multiple ownership rules. The consistency of their position evades me. As they seek (and achieve) ever greater freedom to pursue their business in the media marketplace, on what basis can they come before you now seeking regulatory intrusion in an already-free marketplace on their own behalf, especially where there is no offsetting public interest?

In truth, the public interest lies with maintaining the current system of television music licensing:

--The current system combines the economic incentive to create with maximum public access to creative works -- in accordance with the prescription of our Founding Fathers.

--The current system provides flexibility and freedom of choice for users and creators alike -- in accordance with the free market philosophy our nation so heartily embraces.

--The current system achieves a reasonable, workable balance between competing interests -- in accordance with the Congressional goal of promoting fairness and equity in the commercial marketplace.

Were the broadcasters to succeed in hornswoggling Congress into intervening in the music rights marketplace, there would be only one winner -- the powerful and hugely profitable broadcasting industry -- but there would be many, many losers.

This bill would deny composers continuous payment for continuous use of their music -- in clear contravention of the goals of the 1976 Copyright Act. This would mean that fewer and fewer men and women could pursue professional careers as composers. It is ludicrous for broadcasters to suggest that all they want is to "give America's composers a break" -- what they really want to do is break America's composers.

This bill would force program producers into a strait-jacket. It would gravely constrict their flexibility in choosing music for their shows. It would force producers to swallow new costs for performance rights which they may never use. Moreover, the bill would throw the industry into chaos -- the terms of contracts for thousands of programs that are currently licensed to broadcasters, and thousands of underlying agreements for programs "in the can," would be cast into uncertainty.

This bill would ultimately deny television viewers the new, diverse and creative music they have come to expect. Producers, saddled with increased financial risks, may be forced to slash opportunities for new composers. Moreover, the straitjacket this bill places on the way producers acquire music could ultimately

result in a reduction in the quantity and quality of television programming viewers would see.

In summary, S. 1980 proposes radical surgery on a healthy patient. The bill is not only unnecessary, but harmful. And it may only be the first step in an all-out attack on the blanket license. How far behind can efforts be to eliminate the blanket licenses held by the TV networks and pay-TV services, as well?

* * *

Let us first review how -- and how well -- the current music rights marketplace works. Let us then consider the wrong-headed reasons the broadcasters give for Congressional involvement -- and the real harm this bill would cause. I believe that, once the rhetoric is pared away, Congress will find that the only just result is to leave the broadcasters to their ample options in the current marketplace.

How Television Music Performance Rights Are Licensed

The issue before you is best approached beginning with a few fundamentals.

Today, there are more than 900 commercial TV stations in the United States, approximately 600 of which are network-affiliated, and the rest "independents." All of these stations broadcast all kinds of music in all kinds of programming.

Network-affiliated stations broadcast music in programs and commercials they receive directly from their network. The networks arrange for the licensing of this music on behalf of their affiliates.

Since S. 1980 as introduced affects music licensing for pre-recorded, non-network TV programs and commercials, let us review how these rights are now acquired.

Affiliates and independents alike perform music which is contained in pre-recorded programs* they acquire from "syndicators", companies which market TV series, features and specials to individual stations or groups of stations.

"Syndicated" programs may include:

--"off-network" series, comprised of episodes which previously ran on one of the three national TV networks (e.g., M*A*S*H, which ran on the CBS Television Network);

-- "first-run" weekly drama and situation comedy series produced expressly for syndication (e.g., the weekly series Fame, What's Happening Now, and It's A Living);

--first-run syndicated variety, talk and music programming (e.g., Solid Gold, The Merv Griffin Show, New York Hot Tracks);

--first-run daily series which are "stripped", i.e.; run each weekday at a set time (e.g., the nightly Entertainment Tonight information series, the daily Wheel of Fortune game show);

--religious programming (e.g., The Christophers, The 700 Club).

When a program producer makes a television program, he pays for the right to record the accompanying music in "synchronization" with the action. The music may be written expressly for the program (as theme and background music), or it may be "pre-existing" music which makes an important contribution to the mood or action, or which is itself "featured" in performance.

* There is also a substantial amount of "live" syndicated programming and locally produced programming, which is not directly affected by this bill. Significantly, by so limiting the bill, broadcasters acknowledge the efficacy of the blanket license with respect not only to live programming, but to locally produced programming, whether live or pre-recorded, as well.

Under the copyright law, this "synch" right is separate and distinct from the right to perform the music publicly (the "public performance" right). The TV station that actually performs -- broadcasts -- the program and the accompanying music obtains the music public performance right.

Broadcasters today have four ways to obtain public performance rights in the copyrighted music they broadcast:

Blanket License

Traditionally, TV stations have acquired the public performance rights in the music they use through a "blanket license."

Each station generally acquires blanket licenses from each of the three leading performing rights organizations -- ASCAP, BMI and SESAC. The blanket license allows broadcasters to air virtually all the music they choose, without having to keep detailed records or engage in individual negotiations with thousands of composers and their publishers for music rights.

In exchange for the great flexibility and certainty the blanket license offers, the TV station pays ASCAP, BMI and SESAC a small negotiated fee. ASCAP, BMI and SESAC administer the funds collected from broadcasters, and distribute royalties to songwriters and their music publishers based on how often their music is used.

The "blanket license" has emerged as the clear option of choice among broadcasters.

The reasons for this are simple and straightforward:

-- The blanket license is cost-effective and efficient.

-- The blanket license provides users with a comprehensive liability insurance policy against copyright infringement claims since virtually all copyrighted music is within the repertoires of ASCAP, BMI or SESAC.

-- The blanket license gives TV stations unlimited flexibility in planning their programming schedules. It facilitates decisions to use music on short notice -- e.g., a spontaneous performance on a talk show, or the performance of all the latest tunes on this week's hit parade show. Because even certain pre-recorded TV programs are produced and distributed on short notice, and may include "spontaneous" performances, the blanket license permits use of almost all copyrighted music.

For these and other reasons, the blanket license has been favored in this country not only by TV stations but also by proprietors of radio stations, pay TV services, lounges and restaurants, skating halls, and virtually all others who publicly perform music. In fact, the blanket license has become the internationally-accepted means of licensing music performance rights.

Per-Program License

Alternatively, a TV station may acquire "per program" licenses from ASCAP and BMI. Under the per-program license, a station pays a fee based only on the revenues it receives from those programs which actually include ASCAP or BMI music, respectively. Thus, for example, if a TV station airs 10 programs, and only five of those programs contain ASCAP music, a station could pay a "per-program" fee to ASCAP based only on the revenues from those five shows. The rates for these per-program licenses are also the subject of negotiation between the performing rights organizations and the broadcasters.

Direct License

Broadcasters may also license music rights directly from composers. This is known as "direct licensing." Because ASCAP,

BMI and SESAC represent composers on a non-exclusive basis, the composers are free to negotiate directly with broadcasters.

Source License

Finally, broadcasters may request program producers to deliver programs with the music performance rights already included. This is called "source licensing." Were S. 1980 to become law, this would be the only means permitted for licensing these rights in syndicated programs and commercials.

Public Domain

It should also be noted that there is music available to broadcasters which requires no licensing. This is "public domain" music, on which copyrights have expired or have never been obtained. Because no one owns this music, the broadcaster (or any other user) may perform it publicly as often as he chooses without prior authorization and without paying a fee.

Why Change the System?

Given the evident efficiency, efficacy, proven track record and options of the current system, I must ask: why should this matter now be before Congress? In a world where so little works, why should we upset a mechanism that has worked so admirably?

The broadcasters have a heavy burden to meet for any change they seek. They have utterly failed to satisfy this burden. They offer you every "reason" for change but the real one -- their desire to avoid paying for the music they use.

Let's look beneath the surface of the various arguments with which the broadcasters "justify" their claims.

* * *

The TV stations protest that the blanket license fees they pay are burdensome and excessive. The facts tell just the opposite story.

Broadcasters pay very little for a lot of music. According to the National Association of Broadcasters' own Television Financial Report for 1985, TV stations spend only a little more than a penny per dollar of their net revenues on music performance rights fees (see Exhibit A).

Put another way, a TV station that spends \$50,000 on music license fees annually has net revenues more than 100 times that amount, or about \$5,000,000 per annum.

* * *

The TV stations say that ASCAP and BMI somehow impose whatever fees they wish on each individual local TV station. That is just not true.

The blanket license fees that TV stations pay to the performing rights organizations are the result of hard bargaining conducted with ASCAP and BMI on the broadcasters' behalf by a powerful, well-organized, professionally-staffed organization, the All-Industry Television Music Licensing Committee. The collective power of this nation's \$12 billion local TV industry is seated across the table from the representatives of ASCAP or BMI in these negotiations.

And the broadcasters have fared exceedingly well. Over the years, the negotiated blanket license fees have consistently declined -- the ASCAP rate alone has dropped from a level of about 2.5% of net revenues in 1950 to about 1.15% today.

* * *

The TV stations say ASCAP and BMI put their rates forward on a "take-it-or-leave-it" basis. But how can this be so when the broadcasters are guaranteed a reasonable rate?

The broadcasters may seek review of ASCAP's rates before the Federal court for the Southern District of New York, the so-called "rate court," as a matter of right. And the burden is on ASCAP to prove the reasonableness of its rates.

The broadcasters have never hesitated to take advantage of this device -- in fact, at this very moment, the broadcasters have a rate review proceeding pending before that court.

Let me repeat: even as broadcasters plead with Congress, they are in court, right now, seeking a new rate with the composers' representatives!

* * *

The TV stations says that the "rate court" is not an adequate remedy because it has never rendered a final decision on a local TV blanket license fee.

Does this attest to the futility of rate court review? On the contrary -- the rate court has never issued a final rate because it has never had to. In every instance that a rate-making proceeding was commenced from 1950 until the early 1980s, the final rate was the result of negotiation and compromise.

This attests not to the inefficiency of the system, but rather to the elegance of the machinery in place. The rate court review has done just what was intended -- its very existence has served to move the parties to agreement.

* * *

The TV stations say that the "per-program" license rate is "too high." If this is so, that is only because the broadcasters have failed to renegotiate it.

History shows that the broadcasters have all but ignored the per-program rate in their negotiations with ASCAP and BMI, concentrating instead on their primary, avowed goal: to achieve an

ever-lower blanket license rate. In this, they have succeeded remarkably.

This point was not lost on the Court of Appeals in the Buffalo Broadcasting decision, in which the court rejected an anti-trust challenge to the local TV blanket license brought by the very same broadcasters seeking passage of S. 1980. The court stated: "The degree of difference between the two rates is largely attributable to the stations themselves." (emphasis added)

The broadcasters know full well that the per-program rate is subject to negotiation... and to rate court review. In fact, the All-Industry Committee has at long last chosen to ask the "rate court" to review the per-program rate, and that proceeding is now pending. This procedure is a perfectly fair and adequate mechanism for review.

By law, the per-program rate must be "reasonable" and provide a "genuine choice" for broadcasters. And the burden is on ASCAP to prove the reasonableness of the rate before the court. Thus, the per-program license is in every sense a "realistically available alternative."

As Judge Newman wrote in the Buffalo Broadcasting decision:

The availability of a judicially enforceable requirement of a "reasonable" fee precludes any claim that the (per-) program license rate is too high, especially in the context of television stations regularly represented by a vigorous committee i.e., the All Industry Television Music Licensing Committee with the demonstrated resources, skill and willingness to invoke the rate-adjustment process.

* * *

The TV stations say that production companies that also have music publishing affiliates somehow get an unjust "double payment". That evinces a total misunderstanding of how music rights are acquired, and the role of the music publisher.

First of all, it is simply wrong to suggest, as the broadcasters do, that music publishers affiliated with major TV production companies control most TV music.

While some multifaceted entertainment companies operate both program production/syndication subsidiaries and music publishing subsidiaries:

(1) most syndicators active in the television market do not have music publishing subsidiaries;

(2) most music publishers are not affiliated with program producers and syndicators; and

(3) many programs (especially variety, "top-ten," music video and other programs where musicians perform) use a great deal of music by a huge number of different composers and publishers.

Second, broadcasters imply that music publishers get some kind of "windfall" from public performance rights. Publishers -- whether independent or incidentally affiliated with a TV production company -- do a great deal to warrant their share of compensation for public performances.

As Burton Lane, former president of the American Guild of Authors and Composers, has put it:

Most writers cannot take the time to exploit the songs they write. Every moment is precious to them in order to create. For that reason, composers have agreed to share royalties with publishers, whose job it is to publish and exploit the songs we write. It is a partnership arrangement which has worked well through the years.

What does a composer's publisher/partner do?

-- Publishers nurture newcomers. They take a real chance with untested composers, placing them under contract and give them advances, permitting them to concentrate on their writing.

-- Publishers "plug" composers' works. They actively seek out opportunities for their composers to write. They market their catalogues of pre-existing music to producers of motion pictures, television shows, and commercials. Publishers work to improve the visibility of their composers in a highly competitive business.

-- Publishers examine all marketing possibilities for their composers' works -- from sheet music to audio recordings to live

performances. This is no less true of TV theme music than of any other kind of music. Consider, for instance, how many TV theme songs have become hit records:

- Theme from "Peter Gunn"
- Theme from "Hill Street Blues"
- What'll We Do Without Love (Theme from "Family Ties")
- Where Everybody Knows Your Name (Theme from "Cheers")
- Theme from "Miami Vice"
- Welcome Back (Theme from Welcome Back, Kotter)
- Theme from "Hawaii Five-O"

... to name just a handful of examples. And consider the popularity of such TV soundtrack albums as the "Miami Vice" LP, the album of music from "The Cosby Show," and an entire album of TV theme songs, Television's Greatest Hits, all of them on the best-seller charts.

-- Publishers monitor all the technical and legal complexities involved in protecting their copyrights--and those of their composers--here and abroad.

Composers and publishers work hand-in-hand. They have agreed upon an arrangement that compensates both. It is not the broadcasters' place to second-guess this arrangement.

* * *

The TV stations say that source-licensing of music performance rights for theatrical exhibition of movies is an appropriate model for the syndicated television market. They further argue that this has been the practice in theatres for nearly 40 years, and that composers have done just fine without a blanket license.

The broadcasters are wrong on both counts.

Source-licensing of motion pictures for theatrical exhibition in the United States is an aberration on an international scale. In every other nation in the world with advanced copyright law, motion picture theatres obtain blanket licenses.

Source-licensing of motion picture music in the U.S. arose out of the so-called Alden-Rochelle case, in which a federal

court prohibited blanket-licensing of motion picture theatres. At that time, ASCAP was the exclusive agent for its composer members. ASCAP is now prohibited from representing its composer/members on an exclusive basis. This problem is long since cured -- thus, the theatrical exhibition anomaly is no precedent for today's syndication marketplace.

The fact is, composers of music for motion pictures do benefit from the blanket license. Composers of motion picture film music retain rights to the use of and compensation for their music in all other markets.

-- When the motion picture containing their music is exhibited in theatres or on television outside the U.S., they are compensated through a blanket license.

-- When the motion picture is aired on network or local television in the U.S., they are compensated through a blanket license.

-- When the soundtrack music is performed apart from the film on radio, on a jukebox, in a dance hall, lounge or skating rink, or in virtually any other public setting, they are compensated through a blanket license.

The only thing that makes source-licensing of motion pictures tolerable for composers is the "after life" of the music, and the compensation the blanket license provides for these other uses. If efforts are made to chip away at this compensation -- as the broadcasters propose here -- source-licensing of motion pictures becomes far less palatable for composers.

And let us not lose sight of the potential effect of this bill on reciprocity agreements between the American and foreign performing rights societies, relationships already strained by the absence of compensation for music performance rights in American theatres.

Ultimately, there is a fundamental distinction between the business relationships in which motion picture producers engage

with movie theatres, and those in which they engage with TV stations. Program producers and syndicators would be delighted to contract with television stations just as they do with motion picture theatres: on a "percentage rental" basis, similar to the percentage producers receive from theater owners. That is, producers and syndicators would participate directly in an agreed-upon percentage of the advertising revenue the program generates for the TV station.

It is only appropriate for movie theatres and TV stations to be treated alike if they act alike. TV stations indicate no willingness to change their business relationships.

* * *

The TV stations say that they are unable to obtain source licensing for music in syndicated television programs, and that source-licensing is not a realistically-available option. I say they haven't given the marketplace a chance.

As the Second Circuit Court of Appeals in the Buffalo Broadcasting case observed, the broadcasters never sought source licensing of music at any time prior to the commencement of the litigation. Even then, as the Court of Appeals noted, the requests were (1) made only "to create a paper record to show the unavailability of source licensing," and (2) unaccompanied by "the customary indicator of a buyer's seriousness in attempting to make a purchase -- an offer of a sum of money." Not one red cent was offered for source licensing.

Understandably, the Court of Appeals saw through the broadcasters' "transparent effort to assemble in the midst of litigation evidence that they tried to obtain source licensing."

(emphasis added)

In the words of an official of Warner Communications, Inc., who lived through the broadcasters' "gambit":

It is clear to me, in light of the timing and nature of these requests' from broadcasters, that their sole motivation was to attempt to meet, belatedly, the court's inquiry as to whether the broadcasters had sought licensing at the source. We have yet to receive a serious proposal from a broadcaster for licensing music at the source. (See Exhibit B).

The failure of the broadcasters to pursue source licensing is underscored by the fact that from 1950-1972, BMI's blanket license contained a broad "carve-out" provision. This allowed broadcasters to deduct all revenues for any programs containing BMI music cleared "at the source" or licensed directly from composers from the revenue base on which their BMI blanket license fee was determined. Not only did the broadcasters show no interest in using this provision, but it was ultimately deleted from the blanket license at their insistence.

In fact, as recently as 1985, BMI again offered such a "carve-out" provision in the TV blanket license, and again the broadcasters showed no interest.

S. 1980 is Not Only Unnecessary, But Harmful

I have discussed why I believe legislative changes in the current music licensing system are unnecessary.

But more importantly, I must explain to you why S. 1980 would be harmful.

The bill would place a straitjacket on program producers' use of music, and increase their costs of production.

The bill casts into chaos literally thousands and thousands of existing business contracts for syndicated programming, and jeopardizes the marketability of tens of thousands of programs already "in the can."

The bill violates a key principle of the 1976 Copyright Act: the full and unencumbered "divisibility" of copyrights.

The bill threatens composers of music with loss of continuous payment for continuous uses of their music, and leaves them powerless to negotiate any alternative.

I would like to discuss each of these in turn.

S. 1980 Places Program Producers and Syndicators in a Straitjacket

This bill would have a direct, adverse impact on producers and syndicators.

It would require them to convey the public performance rights for music in their shows to broadcasters, even though it is the broadcaster who publicly performs the work.

The producer/syndicator would have no choice.

The bill would outlaw all other options in the marketplace, and the business practices that have evolved over more than four decades.

How anti-competitive is that? Closing off an "open" marketplace with multiple options and replacing it with a closed one with only a single, exclusive way of transacting business.

If source licensing is mandated, numerous television shows that make great use of pre-existing music would be particularly vulnerable.

For example, the producers of many popular first-run syndication programs would be greatly constrained in their choice of music. These shows may use a dozen or more pre-existing songs per show. Working on a tight weekly timeline, with small staffs and limited budgets, these producers would be hamstrung.

Many producers would have great difficulty in absorbing the additional costs associated with acquiring music rights for their programs, particularly since they do not know exactly what rights they need to acquire. This extra unknown cost in an already highly deficit-financed industry will make business all the more difficult for many producers.

S. 1980 Would Throw the Syndication Business into Chaos

This proposed change would have a chaotic impact on existing contractual relationships for television programs and existing inventories.

Under this bill, existing syndication contracts would have only a one-year grace period from the source-licensing requirement. But, syndication contracts normally run three to seven years, and sometimes considerably longer. Thus, the bill would have massive retroactive impact on existing contracts. This is inherently unfair.

Also highly vulnerable are the huge inventories of pre-existing programming, produced over the past 40 years, which are available to TV stations. The huge task of tracking down music rights holders for the thousands and thousands of programs already "in the can", or excising music from the soundtracks of these programs, would be daunting and enormously costly.

There is no justification whatsoever for inflicting such a body blow on the syndication business.

S. 1980 Undercuts Divisibility of Copyrights.

The copyright law grants copyright owners many separate and distinct rights. Our law treats these rights separately so users of copyright works are able to secure licenses in the marketplace only for the rights they are required to obtain. It permits a copyright owner to make separate deals with separate users of his or her work -- to license the synchronization rights and performance rights to different persons and at different times. Thus, current law allows copyright owners to meet user demand with flexibility and efficiency.

This is known as divisibility of copyright and is expressly authorized by the Copyright Act. As the House Judiciary Committee noted in 1976 "any of the exclusive rights that go to make

up a copyright, including those enumerated in Section 106 and any subdivision of them, can be transferred and owned separately."

This legislation would frustrate this central feature of the Copyright Act.

S. 1980 would compel all producers and syndicators to obtain both synchronization and performance rights for music in their programs on behalf of broadcasters. It would do so despite the fact that these producers/syndicators do not perform the music, but the broadcasters do.

This bill would have the effect of vitiating the copyright owners public performance right in pre-packaged syndicated programs by merging it with the synchronization right.

This is an unprecedented and uncharted route for Congress to embark on.

Ralph Oman, Register of Copyrights, recognized the unprecedented nature of S. 1980 in his prepared testimony before the House Copyright Subcommittee last month:

This proposed prohibition of the conveyance of one right without the conveyance of another is a unique one in the Copyright law; it goes against the concept of divisibility explicitly recognized in the 1976 Act. (emphasis added)

S. 1980 Leaves Composers in the Lurch

Composers would be severely hurt by this legislation.

Under the copyright law, composers are entitled to be compensated each time their works are publicly performed. The current system accomodates that statutory right.

The current system encourages "newcomers" to persevere, with the knowledge that if their music is successful, they will be paid based on future uses of their works in all markets (with the sole exception of theatrical), including local television.

If S. 1980 becomes law, the current system of continuous payments to composers for continuous use of their music in the local television marketplace would end.

The composer would be forced to license his performance rights up front, long before the true value of his music is known. The composer is not a soothsayer. He cannot, for example, predict whether a network pilot program in which his music is contained will ever make it onto the network, let alone into syndication... especially when only one out of every 35 pilots ever makes it that far.

Under S. 1980, composers would have to devise elaborate mechanisms to monitor performances of their copyrighted music, and to collect royalties. This would divert their time and energy from their creative efforts.

The broadcasters cavalierly suggest that some new system of continuous payments could replace the current blanket license system. But composers don't want or need a new system. It would be unnecessarily duplicative. The current system would have to remain in place to pay composers for the performance of their music in media other than non-network television. Nor is there any certainty that any new system could work as well.

Above all, why reinvent a wheel that already rolls?

Broadcasters Can Take Care of Themselves in the Marketplace

As a matter of principle, the broadcasters are on marshy ground, for all the reasons I have noted.

But as a matter of marketplace economics, the broadcasters have no case whatsoever.

TV stations pay extremely little for the music they broadcast -- barely over one percent of their net revenues, according to the broadcasters' own statistics (see Exhibit A). Broadcasters generally pay as much or more for their subscription to ratings services -- to find out who's watching -- as they do for all the music they broadcast.

At the same time, TV stations are hugely profitable operations. The average TV station has pre-tax profits on the order of 30 percent -- a return matched by few other industries. Thanks to recent deregulation of ownership and other factors, TV stations have skyrocketed in value -- it is not uncommon for stations in major TV markets to change hands for prices of \$300-500 million each -- many, many times the value of the station's tangible assets.

Let's remember by what means these broadcasters have reaped their bounty. They are the proud and exclusive beneficiaries of scarce federally-conferred broadcasting licenses for which they pay not one red cent. They enjoy a federal subsidy of a magnitude that boggles the mind.

Broadcasters are well-off financially. They pay very little for their blanket licenses. Their success in keeping their blanket license rates low is no doubt the result of their collective power at the bargaining table, achieved through the All Industry Television Music Licensing Committee.

Are the broadcasters also well-equipped to take care of themselves at the bargaining table with television program syndicators? Without question.

Nationwide, there are far more TV program producers and syndicators with far more programs for sale than there are available time slots to show these programs. It is typical for a syndicator to have only three or four potential buyers in a TV market. Few customers, many, many sellers, equals a buyer's market.

The competition among syndicators for airtime on those few outlets is intense. Consider:

-- At the National Association of Television Program Executives (NATPE) convention held in New Orleans in January, 231 producers, syndicators and distributors offered over 2,500 programs for sale to broadcasters.

-- The 1986 Broadcast Information Source Books, the industry resource on available TV programming, lists almost 500 syndicators/distributors, offering approximately 10,000 series programs and 25,000 features, movies or mini-series to U.S. TV broadcasters.

-- As The Wall Street Journal recently observed, "Once sizzling demand for syndicated television programs appears to be cooling, even as companies that make the shows are stepping up production. The result is liable to be a classic Hollywood profit squeeze, with too many shows chasing the available buyers."

These facts all argue that a TV station holds the upper hand in bargaining for terms and conditions for most of the programming it airs. That includes "source-licensing" of music.

Congress Should Leave Broadcasters to Their Ample Options in the Marketplace and At Law

Broadcasters want Congress to enact legislation dictating a single way of doing business -- source licensing -- and foreclosing the other options available in today's open marketplace.

Why should Congress radically alter the TV music marketplace to the broadcasters' specifications, when the broadcasters have failed to take full advantage of the various options readily available to them today, particularly the very option they would mandate by law?

Why should Congress thrust itself into the marketplace when there is an ongoing rate court review of both the blanket license and the per-program license, initiated by the broadcasters?

Rather, let the broadcasters use their clout in the marketplace to give source licensing a chance.

Let them continue to pursue their own rate court proceeding.

Then, let them follow the sage advice of the chairman of the All-Industry Television Music Licensing Committee, who listed the broadcasters' ample non-legislative options in the marketplace and at law (see attached article from Hollywood Reporter, Exhibit C).

There is no need for Congress to intervene.

EXHIBIT A

**TV STATIONS ARE HIGHLY PROFITABLE... AND THEY
PAY VERY LITTLE FOR THE MUSIC THEY BROADCAST**

How profitable are the television stations in your district or state?

How little are these stations paying for TV music rights?

For the answers to these questions, follow these steps:

(1) Find the name of the relevant local TV market(s) on the list below. All the nation's TV markets are listed alphabetically by name of city. By way of example, find "Columbia, SC."

(2) Find the "rank" of the television market. For example: Columbia, SC is the nation's 88th largest TV market.

(3) Now turn to the chart, "Comparison of TV Station Revenues, Profits and Music License Fees." Columbia, SC--the nation's 88th largest TV market--is included in "ADI Mkts. 81-90."

You will see that, in 1984, the average TV station in these markets had annual net revenues of \$5.797 million, average pre-tax profits of \$1.545 million (or a profit margin of 27%), and paid music license fees of \$62,500... about 1.07% of net revenues.

By comparison, in the same year, the average station in these markets paid \$64,300 for its rating service fees to such companies as Arbitron and Nielsen. That means that TV stations in these markets paid just about as much to find out who was watching their stations as they paid for all the music they broadcast!

As you will note, the broadcasting industry's own data show that TV stations are highly profitable and pay very little for the music they air.

ALPHABETICAL LIST OF ARBITRON "AREAS OF
DOMINANT INFLUENCE" (ADIs)

City	Rank	City	Rank	City	Rank	City	Rank
Adrian-Southester, TX	156	Das Marais, IA	66	Laurel-Helmsburg, MS	166	Rochester, MN-Mason City, IA-Austin, MN	141
Adrian, GA	152	Deer, MI	7	Lawson, KY	76	Rochester, NY	71
Adrian-Schweitzer-Troy, NY	52	Dorham, AL	161	Lima, OH	198	Rockford, IL	111
Adamsburg, MI	64	Duluth, MN-Superior, WI	119	Lincoln-Hastings-Kearney, NE	90	Roseville, MI	163
Adamsville, LA	163	El Centro, CA-Yuma, AZ	179	Little Rock, AR	56	Sacramento-Stockton, CA	20
Adamsville, MI	180	El Paso, TX	87	Los Angeles, CA	2	St. Joseph, MO	168
Adams, MI	210	Elm, KY	166	Louisville, KY	45	St. Louis, MO	17
Adamsville, TX	116	Erie, PA	135	Lubbock, TX	128	Salinas-Monterey, CA	110
Adams, AL	194	Eugene, OR	128	Macon, GA	142	Salisbury, MD	167
Adams-John, OK	173	Eureka, CA	162	Madison, WI	107	Salt Lake City, UT	42
Adams, GA	104	Evansville, IN	87	Marquette, MI	207	San Angelo, TX	193
Austin, TX	81	Fargo, ND	102	McKenzie-Brownsville, TX (Lower Rio Grande Valley)	117	San Diego, CA	26
Bakersfield, CA	150	Flagstaff, AZ	205	Medford, OR	155	San Francisco, CA	5
Baltimore, MD	21	Flint-Saginaw-Bay City, MI	58	Memphis, TN	41	Santa Barbara-Santa Maria-San Luis Obispo, CA	114
Bangor, ME	154	Fort Myers-Naples, FL	112	Mendota, IL	189	Sarasota, FL-158	108
Baton Rouge, LA	88	Fort Smith, AR	147	Meriden, CT	14	Seattle-Tacoma, WA	16
Beverly-Hartford, TX	121	Fort Wayne, IN	96	Midvale, UT	13	St. Louis, MO	208
Beverly, OR	206	Franklin, CA	174	Minneapolis-St. Paul, MN	13	Shreveport, LA-Texas, TX	53
Billing-Hardin, MT	164	Gandhi, MT	211	Minneapolis-St. Paul, MN	13	Sioux City, IA	139
Black-Gulfport-Prentiss, MS	178	Grand Junction, CO	184	Minneapolis-St. Paul, MN	13	Sioux Falls-Mitchell, SD	83
Birmingham, NY	123	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	South Bend-Elkhart, IN	85
Birmingham, AL	47	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Spokane, WA	75
Bluefield-Buckley-Oak Hill, WV	143	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Springfield, MA	84
Bloomington, IN	134	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Springfield, MO	82
Bloomington, IL	8	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Springfield-Oscar-Champaign, IL	70
Bonding Green, KY	162	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Syracuse, NY	67
Bristol, VA-Grapesport-Johnson City, TN	86	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Tallahassee, FL	136
Buffalo, NY	26	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Tampa-St. Petersburg, FL	18
Burlington, VT-Plattsburgh, NY	101	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Terre Haute, IN	127
Casper-Albany, WY	180	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Toledo, OH	80
Cedar Rapids-Waterloo-Dubuque, IA	77	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Topeka, KS	136
Charleston, SC	106	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Traverse City-Cadillac, MI	136
Charleston-Huntington, WV	43	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Tucson, AZ	83
Charlotte, NC	32	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Tulsa, OK	54
Chattanooga, TN	80	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Tulsa, OK	54
Chattanooga, TN	190	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Tulsa, OK	54
Chicago, IL	3	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Tulsa, OK	54
Chicago-Rockford, CA	140	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Tulsa, OK	54
Cincinnati, OH	27	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Tulsa, OK	54
Cincinnati-Western, WV	165	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Tulsa, OK	54
Cleveland, OH	11	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Tulsa, OK	54
Colorado Springs-Pueblo, CO	105	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Tulsa, OK	54
Columbia, SC	86	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Tulsa, OK	54
Columbia-Jacksonville, MO	145	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Tulsa, OK	54
Columbia, GA	115	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Tulsa, OK	54
Columbia, OR	34	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Tulsa, OK	54
Columbia-Tulsa, MO	137	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Tulsa, OK	54
Cornwall, TX	125	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Tulsa, OK	54
Dallas-Fort Worth, TX	8	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Tulsa, OK	54
Dayton, OH	74	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Tulsa, OK	54
Dayton, OH	69	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Tulsa, OK	54
Denver, CO	19	Grand Rapids-Kalamazoo-Battle Creek, MI	40	Minneapolis-St. Paul, MN	13	Tulsa, OK	54

COMPARISON OF TV STATION REVENUES, PROFITS, AND MUSIC LICENSE FEES

SOURCE: 1985 Television Financial Report, National Association of Broadcasters, Washington, D.C.

ADI Mkts. ¹	Avg. Net Rev. ²	Avg. Pre-Tax Profit (and %)	Avg. Music Lic. Fees	Lic. Fees as % of Net Rev.	Rating Service Fees ⁵
1 - 10	\$39,429,300	\$14,252,200 (36%)	\$404,600	1.02%	\$502,300
11 - 20	\$21,750,200	\$ 7,289,000 (34%)	\$253,700	1.16%	\$223,300
21 - 30	\$17,737,200	\$ 5,142,800 (29%)	\$218,300	1.23%	\$191,200
31 - 40	\$10,839,500	\$ 2,543,600 (23%)	\$126,700	1.16%	\$138,400
41 - 50	\$ 9,593,500	\$ 2,879,700 (30%)	\$122,100	1.27%	\$120,400
51 - 60	\$ 7,092,900	\$ 1,914,000 (27%)	\$ 96,100	1.35%	\$ 97,100
61 - 70	\$ 6,660,100	\$ 1,293,200 (19%)	\$117,000	1.75%	\$ 87,200
71 - 80	\$ 6,065,800	\$ 1,281,400 (21%)	\$ 87,800	1.44%	\$ 79,900
81 - 90	\$ 5,797,500	\$ 1,545,500 (27%)	\$ 62,500	1.07%	\$ 64,300
91 - 100	\$ 5,135,300	\$ 1,089,300 (21%)	\$ 62,400	1.21%	\$ 68,600
101 - 110	\$ 5,481,900	\$ 1,273,200 (23%)	\$ 63,400	1.15%	\$ 62,500
111 - 120	\$ 3,778,600	\$ 796,700 (21%)	\$ 42,300	1.11%	\$ 48,700
121 - 130	\$ 3,265,600	\$ 761,800 (23%)	\$ 43,700	1.33%	\$ 37,200
131 - 150	\$ 2,880,700	\$ 426,700 (15%)	\$ 36,300	1.26%	\$ 38,500
151 - 175	\$ 2,793,200	\$ 538,100 (19%)	\$ 37,000	1.32%	\$ 30,500
176 +	\$ 2,105,600	\$ 324,800 (15%)	\$ 24,000	1.13%	\$ 24,300

FOOTNOTES

- 1 ADI (or Area of Dominant Influence) is equivalent to a "local television market." For example, Los Angeles, CA is the second-largest ADI; thus, for purposes of this chart, Los Angeles falls in ADI markets 1 through 10.
- 2 For purposes of the NAB report, net revenue is derived by adding network compensation, plus national, regional and local advertising revenue, plus certain other revenues, and deducting agency and rep commissions
- 3 Pre-tax profit is derived by subtracting total station expenses from total net revenue. Pre-tax profit is then stated as a percentage of total net revenue.
- 4 The NAB Report defines this figure as "The cost of license fees payable to ASCAP, BMI, SESAC and other similar music licensing organizations."
- 5 The NAB report defines this figure as "The cost of Nielsen, Arbitron, Broadcast Advertisers Report (BAR), etc. Because these costs roughly approximate stations' music license fees, they provide a useful point of reference."



• WARNER COMMUNICATIONS INC.

Legal Department

February 24, 1986

The Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil
Liberties and the Administration of Justice
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Kastenmeier:

I am counsel for Warner Communications Inc., and I am writing about H. R. 3521 about which, as you know, my company is extremely concerned. This bill would require that those who produce and syndicate non-network television programs assume the obligation to secure and convey to the television broadcasters the rights to publicly perform copyrighted music in those programs. (This is known as "licensing at the source"). Those rights traditionally have been obtained by the broadcaster making the performance.

In the course of the debate on this bill, it has been suggested by broadcasters that this legislation is needed because:

- a) Broadcasters have been unable in the market to secure licensing of music at the source, and
- b) Producers will not consider source licensing in the future.

I am writing to set the record straight from Warner's point of view on these two issues and, in addition, to suggest some of the serious business questions that must be answered about any source licensing plan.

First, with regard to previous broadcaster inquiries on source licensing, the facts regarding my company are as follows. In October, 1981, I had lunch with Messrs. Arnold Wadler and Alfred Schwartz of Metromedia. That meeting was set up because Mr. Wadler had called me and told me that he wanted to discuss a Metromedia proposal that Warner arrange for clearing at the source music to be included in filmed programs which were intended for immediate or eventual telecasting in television syndication. In that meeting, Messrs. Schwartz and Wadler gave me Metromedia's views.

I told them that the issue was a new one to me, that there were undoubtedly a number of business concerns to address and that I would discuss the matter with Warner executives and come back to Messrs. Schwartz and Wadler to arrange another meeting to discuss the questions I was sure would be raised. I did review the matter with Warner

executives and on November 13, 1981, I wrote to Mr. Schwartz telling him that I had had those discussions and that ".... we were left with a great many questions which perhaps you can answer". I asked that Mr. Schwartz call me to set a date for another meeting. I heard nothing further from Mr. Schwartz, Mr. Wadler or anyone else at Metromedia.

My contacts with the Metromedia representatives all took place during the period that the broadcasters' antitrust suit against ASCAP and BMI was on trial in the Federal District Court in New York. During that same period and also while that case was before the Court of Appeals for the Second Circuit and until the Supreme Court denied the broadcasters' petition for certiorari, a handful of broadcasters unilaterally attached amendments to their syndication license agreements purporting to provide that Warner Bros. would obtain and provide to the broadcaster, the public performance rights in the music contained in the films being licensed. These proposed amendments were rejected by Warner Bros. because they were not the result of any good faith negotiations and did not resolve any of the questions presented by the source licensing approach.

It is clear to me, in light of the timing and nature of these "requests" from broadcasters that their sole motivation was to attempt to meet, belatedly, the court's inquiry as to whether the broadcasters had sought licensing at the source. We have yet to receive a serious proposal from a broadcaster for licensing music at the source.

With regard to the future, although licensing at the source presents some serious questions, Warner Bros. has been and remains willing to give serious, good faith consideration to any proposal for such an approach. Warner Bros. is, after all, in the business of licensing feature films and television movies and series in syndication. Warner Bros. expends much by way of money, time and effort in marketing its product to broadcasters and trying to get them to license its product. It is a very competitive market. Each television station has only a limited number of hours it can possibly devote to programming.

In many markets there are only one or two television stations but a multitude of program distributors vying for the limited available time.

As I said, after my meeting with the Metromedia representatives, I discussed the matter with my Warner Bros. colleagues. The questions that were raised in discussions with the Warner executives and still remain unanswered go to the economics and impact of a system of "licensing at the source".

Briefly stated, some examples of these questions are:

What method is to be used by the producer to determine the value of a program's music in advance of marketing the program?

How is the composer or publisher to value the music without knowing the number of performances or the markets in which the performances will be made?

If the current rates are perceived by broadcasters as being too high, how much are they willing to pay for the music they perform?

If less than at present is to be paid, who will bear the shortfall? The producer? The composer? The music publisher?

What about the years and years of programming already produced which may be syndicated in the future? Is it feasible to renegotiate thousands of old music licenses?

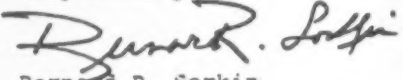
What about programming already syndicated for many years hence?

What would be the impact on foreign music payments? If there is a negative impact, who will bear the shortfall?

The syndication market is but one use of a television program. What would be the impact on network, pay cable and basic cable programming. What about specials and sports programming? Live programming? How should music performed in these programs be licensed?

As you can see, to our mind this question of source licensing, particularly source licensing required by law, is not a simple matter. Warner Bros. would be pleased to meet with broadcasters to review these questions and to consider any proposals they might have to deal with these important issues. It is, however, Warner Bros.' strongly held view that there is no justification for legislation that would mandate a particular method of dealing in the production and distribution of programming for television.

Respectfully,


Bernard R. Sorkin

cc: Members of the Subcommittee
Mr. Jason S. Berman
Mr. Timothy A. Boggs

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Broadcasting outlines licensing alternatives

By BOB GRANGER
and JEFFREY BRESNER

NEW YORK — Faced with a refusal this week by the Supreme Court to review a 1984 Appeals Court ruling concerning the legality of BMI and ASCAP's blanket licensing practices, the All Industry Television Music Licensing Committee yesterday outlined future strategies to negotiate competitive licensing alternatives.

"There are other ways to skin a cat," said one committee member during a press conference at which several possible options were detailed. According to Committee chairman and Buffalo Broadcasting Co. president Les Arries, those options include "a rigorous presentation of the industry's licensing circumstances in the so-called federal 'rate court,' which is empowered to set 'reasonable' license fees under ASCAP's government consent decree and, if need be, before the Department of Justice which oversees that decree." Arries added the battle may also be fought in the marketplace, "where more and more stations have joined the effort and where the message that change is needed will eventually come through."

While bargaining specifics are still in preliminary stages, several proposed moves were revealed at the media gathering, including payments on a per-program basis, a "carve out" of blanket license fees that would work like itemized tax deductions, and increased use of library music, in which all rights are cleared prior to purchase by broadcasters.

Another possibility calls for music publishers to license their catalogs directly to broadcasters, and the committee reported "preliminary discussions" are now under way with numerous publishers.

Arries commented that the current price of music licensing is way out of proportion compared to the actual role that tunes play in most programming. "Music has been overinflated in importance," he stressed, questioning why music for the show "MASH," for example, was considered more valuable than the contributions of star Alan Alda's performance or the work of the show's director and producer. Committee counsel Bruce Rich said he was "in the process" of marshaling together all program payment elements to demonstrate the "incredible disproportion" of music license fees compared to what the scriptwriter, director and talent reap for their labors.

Arries also compared the current blanket license payments to a smorgasbord, and wondered why broadcasters had to pay for using several million songs when they may actually use only a handful each year. "Why should you pay for a whole buffet when you just eat one cream puff," he asked rhetorically.

Despite the serious setback of the Supreme Court announcement on Tuesday, Committee members appeared optimistic that a settlement suitable to all parties could be achieved during the rate court proceedings or at bargaining talks between broadcasters and the music licensing industry. "There's a lot of talking to be done," remarked Arries, who believes "creative" approaches to the situation from ASCAP, BMI as well as the committee will be sought in weeks to come in hopes of determining a fair conclusion to the matter.

Senator MATHIAS. Well, thank you very much, Mr. Valenti.

I wondered how you were going to end up Socrates [Laughter.] I had some inkling of what the end of the story was, but I did not know how you were going to bring it about. [Laughter.]

Mr. VALENTI. I Hope I was more persuasive than Socrates, Mr. Chairman.

Senator MATHIAS. Before we start on questions, let me say that the administration has been unable to present testimony in person with respect to its views on S. 1980 this morning.

I am advised that there will be a written statement of the administration's position which will be available in the very near future and, without objection, that will be included in this part of the record.

Senator HATCH. Mr. Chairman, could we also request a statement from the Commissioner of Patents? I think that might be important as well.

Senator MATHIAS. I am advised that the Commissioner of Patents will be the spokesman for the administration.

Senator HATCH. All right.

Senator MATHIAS. So, if there is anything further needed, of course, we can request ...

Mr. Epstien, was there a positive response to some of the letters by some of the producers, syndicators?

Mr. EPSTIEN. There was never a positive response as it applied to willingness to negotiate a price from music performing rights.

Mr. VALENTI. May I speak to that, Mr. Chairman?

Senator MATHIAS. Yes.

Mr. VALENTI. With all due respect and affection for my new friend, Mr. Epstien, that is untrue.

And I will tell you I have one letter here that is of recent date from Warner Bros. February 24, 1986, the first time that they were asked to comment on this.

They say: "As you can see, to our mind this question of source licensing, particularly source licensing required by law, is not a simple matter. However, Warner Bros. would be pleased to meet with broadcasters to review these questions and to consider any proposals that might have to deal with these important issues."

Paramount, which, by the way, was profoundly distorted in some of the written material, Paramount says: "Notwithstanding all of our objections and we think problems in source licensing, Paramount is willing to consider any fair and concrete plan that this particular company, the Chronicle, as a valued customer would like to propose in connection with the acquisition of music performance rights."

Now, I am a minor amateur student of the mother tongue, and I do not find that a denial of source licensing. What they are doing is what any prudent man would say is, I think I have got a lot of problems here and I will cite them to you. But I am willing to listen to any kind of proposals you are willing to make.

I do not find that an indignant and total turndown.

Mr. EPSTIEN. May I make one comment?

Mr. BLUMENTHAL. Mr. Chairman, may I also just make one statement?

Senator MATHIAS. Let us not let this become a tennis match, but let us let Mr. Epstien comment.

Mr. EPSTIEN. I cannot comment on any letters that took place after I left Storer. But I can comment on a letter that I received from a Dan McRae at Warner Bros. in May 1983, in which he said, and I quote: "We cannot accept any provisions contrary to the provisions of said article VI, music performing rights."

Mr. VALENTI. Is that the entire letter?

Mr. EPSTIEN. No, it is not the entire letter.

Mr. VALENTI. OK.

Senator MATHIAS. Mr. Valenti, do you have a copy of your letter with you?

Mr. VALENTI. Yes, sir.

Senator MATHIAS. Well, we have asked Mr. Epstien for his letter so I guess we ought to ask you for yours.

Mr. VALENTI. Yes, we have it, sir, and will make that available to you and all the others.

Senator MATHIAS. Without objection, we will include that in the record.

Mr. BLUMENTHAL. I just have one item that I would like to add to Jack's response.

We, for the last 16 years, MTM, have been a rather major supplier of television programming. And perhaps we were not on Mr. Epstien's mailing list. But I have never received a letter or a request to enter into source licensing negotiations with the Storer stations.

What did happen—and I do not know if Mr. Epstien was involved in it—but in some of the licensing work that we did with them, our contracts were sent out, and the Storer stations unilaterally crossed out paragraphs without negotiation in those contracts. But we were never asked to sit down and work out any specific source licensing or any other form. And this was all going on during the *Buffalo Broadcasting* case in terms of crossing out paragraphs unilaterally.

Mr. EPSTIEN. I have a letter directly to MTM right in my hands, Mr. Chairman, that is dated August 17, 1983. And I will not go on to read about it. But, in fact, there were several pieces of correspondence between Storer and MTM concerning this particular issue.

Mr. BLUMENTHAL. Was that requesting us to sit down and have a source licensing negotiation? Because I do not know what letter you are talking about. Is it addressed to me?

Mr. EPSTIEN. It is addressed to Mike Blumenthal.

Mr. BLUMENTHAL. Mike Blumenthal? Must be my brother. [Laughter.]

That is the reason why it never reached me. It was the wrong man.

Did that letter request a negotiation? Was that in terms of crossing out paragraphs unilaterally on a license agreement?

Mr. EPSTIEN. This particular letter refers to conversations which took place between Abiah Church, our general counsel, and Jim Victory who was representing you, I believe, for the program "WKRP in Cincinnati."

Mr. BLUMENTHAL. But does it request a meeting to sit down and negotiate a source license?

Mr. EPSTIEN. Yes. An earlier letter did so, yes.

Mr. BLUMENTHAL. Well, I would like to see that earlier.

You are saying it is not in this letter?

Mr. EPSTIEN. It is not in this particular letter because this refers to conversations. But I will be happy to provide the letters after this.

Senator MATHIAS. Well, let me ask you further, Mr. Epstien.

It is my understanding that during the *Buffalo Broadcasting* case, that various broadcasters, and I do not charge you with knowledge of what everybody in the industry was doing, but various broadcasters sent out many letters to the producers of television programs.

To your knowledge, did any of these producers or syndicators agree to provide free cleared source licensed programs to television stations?

Mr. EPSTIEN. I can only speak on behalf of Storer, and the answer is no.

Senator MATHIAS. Well, I would suggest to you that we are advised that there were a number of small producer/syndicators who did offer to provide source licensed programs to stations who had sent out these letters during the *Buffalo* case.

But the question that would interest me is how many stations took up the small producer and actually entered into agreements for the programming? But you cannot advise us as to that?

Mr. EPSTIEN. I only can advise you to Storer's experience with the syndicators in Hollywood.

Senator MATHIAS. Now, Mr. Valenti, let me ask you. We have heard today that producers and syndicators are unwilling to provide precleared programming to television stations. And since a good many of these producers are members of your organization, can you shed any light on these negotiations between producers and television stations?

You mentioned one case.

Mr. VALENTI. One of the problems that comes up, and it has never been brought out in this hearing so far that I am aware of, is the absolute chaos that would envelop the whole production community and the music community, if you mandated only one way to license the music—and let me cite you an example. Let me give you some programs that you know about.

Let us take "Casablanca." Let us suppose you pass this bill, and only source licensing is now permissible under the law. "Casablanca" has 11 major outside composers who contributed to the worth and the value of what I think even the harshest critics of the production community would call a classic. You would have to have negotiation rights with all those 11 composers, all those composition as required by the law. And if the negotiations failed, for whatever reason, some widow of one of the music composers said no, I do not want to do that, you would have to excise the music from the film, have to take out "As Time Goes By," for example, or "Love for Sale" or "It Had to be You."

You know, I am struck dumb by the notion of that taking place. But that is part of the chaos. There are——

Senator MATHIAS. Can I interrupt you while you are on the "Casablanca" thing? Because I think it helps to understand the situation.

There was a man named Herman Hupfeld. He might have spent his life at United States Steel and left his family some stock in that company, or he might have spent his life working for a labor union and left his family some pension rights that he earned in that way. Or he might have spent his life acquiring property in other ways.

But what he did was write "As Time Goes By." Now, under the current system, every time "Casablanca" is shown on television, "As Time Goes By" is performed, and it generates some interest on the part of the Hupfeld estate.

If S. 1980 became law, how would the syndicator go about acquiring these rights to play or otherwise use this valuable intellectual property?

Mr. VALENTI. Mr. Chairman, maybe Mel wants to comment. It would be a nightmare, an absolute, almost irretrievable nightmare.

There are some 20,000 to 30,000 films. There are 4,000 to 5,000 television shows, all of whom have music. The renegotiation of those contracts would take the life span of grandchildren of the young staff members who are sitting around this table. I mean that is how difficult it would be to undo something that has been in being for over 40 years without any pain, and, I would say, clear and present danger that that system is not working.

The only reason that has been given so far is that television stations want to make more money.

Here, one of my associates has put forward, this is the "TV Feature Film Source Book." I think there are some 20,000 in here. These are all films which are in the marketplace which have music in them. Here are series, serials and packages, domestic edition, 1985. These are all the television series. It would take you several weeks to read it all, much less negotiate.

So I am saying to you please understand this Pandora's box that you open if this bill is passed. The bill is only one line, but that one line can cause irreparable damage without any reason for collapsing the system.

Here it is in the books, and these will be made available to you if you want.

Mr. VALENTINO. May I comment on that, Mr. Chairman?

Senator MATHIAS. Yes.

Mr. VALENTINO. As a publisher who does synchronization licenses, I strongly feel that it would be just as simple to tack on a performance license when you sell a synchronization license even to a syndicator or a television station.

The situation that I think will be served very strongly in passage of this S. 1980 bill would be these categories on my chart getting larger, the white category and the blue category. Possibly the red category, which is, if I might venture to assume the reason Mr. Valenti is here representing the people who own the shows, that certainly might go down. But the public interest would be served by this deregulation of the blanket license system because the system is simply inequitable.

Source licensing is simply the fairest way of accounting, of accurate accounting for use of music in every instance of TV broadcasting.

The white category would be increased and the blue category would be increased. Those people are the little people that ASCAP and BMI would say that they would like to help. But right now, 85 percent of them get nothing.

So this is what I think would be the effect of source licensing.

Mr. VALENTI. Mr. Chairman, do you know why this gentleman is here today? I will tell you, Mr. Valentino. It is simply for one word. It is called "money."

If this is true, I think it is irrelevant, the 85 percent does not make any difference. But I presume what he wants is, he wants to be in that 85 percent that is making money.

So the problem here is money. That is all we are talking about. I do not think that is a proper forum for this. That is a negotiating, bargaining table problem, an issue between the parties in question. And there is a forum for it. It is called the courts. There is negotiation that goes on.

That is an irrelevant chart that has no bearing on this case.

Senator MATHIAS. Let me ask Mr. Valentino this question since we started on this tack on "Casablanca."

Now, Mr. Hupfeld, I understand, is dead. The deal was cut on "As Time Goes By" more years ago than I like to think.

How does the passage of time affect this equation?

Mr. VALENTINO. Well, the passage of time, based on the copyright law to begin with, of course, is public domain, eventually will become public domain.

But before that happens, of course, we are talking about renegotiating rights for—

Senator MATHIAS. Under the 1976 Act?

Mr. VALENTINO. Yes.

Senator MATHIAS. You have to have quite a bit of passage of time before.

Mr. VALENTINO. Yes. As the passage of time goes.

Senator MATHIAS. "As Time Goes By"? [Laughter.]

Mr. VALENTINO. "As Time Goes By," right. [Laughter.]

I assume you would have to renegotiate performance rights on a residual basis, which is not only doable but very easily done with the new technology we have today.

There is a company in Los Angeles called TPI, Talent Payments, Inc., that can act in the same way of residual payments as ASCAP and BMI did, but only on a source licensing basis rather than a blanket licensing basis.

So there is no problem with doing it. It is just the fact that some people do not want to do it. And I think the reason they do not want to do it is not particularly to protect the composers or the songwriters, but to protect the ASCAP and BMI's fiefdom in this area.

They would suffer probably the most.

Senator MATHIAS. What do you say to the proposition which which was expounded here earlier today, that the present system will in some way erode the protection of intellectual property?

Mr. VALENTINO. I noted that testimony before. And my personal feeling on it is that nothing essentially will happen that will—everybody came up here from ASCAP and BMI and the opposition in terms of the world is going to fall apart if you have source licensing. You are going to have composers who will not be able to get jobs; they will on the streets selling apples. I do not think that would be the case.

What I think you have is a situation whereby ASCAP and BMI would manage less money, which is true. But that money, that less money they manage would be recouped by the composers and the songwriters in other ways, through the source licensing, direct licensing.

So I do not think you will have any more or less money. I think you will just have it going in different ways to the composers.

Senator MATHIAS. But it is not the composers, it is the broadcasters that are saying that the present system will erode.

Mr. VALENTINO. Well, the blanket license system is a very—I consider it unequal in terms of the income that goes in. But that is not my concern, the income that goes in. But the distribution of it is unequal in terms of how it is distributed to the people who are members of ASCAP and BMI.

Senator MATHIAS. Now, you and Mr. Epstien say that there is no problem in doing it, or at least this is what I hear you saying.

If there is no problem in doing it, why do not television stations do it? Why do they not enter into direct licensing agreements with the executors of Mr. Hupfeld? Why should a syndicator have to do it?

Mr. EPSTIEN. There is no incentive in the present system today for a television station to negotiate directly with a composer because it is still paying under its blanket license 2 percent of its gross revenue. So it is a double payment. He has got to make that payment to ASCAP and BMI.

Mr. VALENTINO. During the Buffalo Broadcasting—

Mr. VALENTI. What he does not tell you on that particular issue, see, this is what I say by little distortion of the facts.

I am quoting from my own testimony which I consider to be canon law, you understand. [Laughter.]

The failure of the broadcasters to pursue source licensing is underscored by the fact from 1950 to 1972, BMI's blanket license contained a broad carve-out provision. But without the carve-out, source licensing does not mean anything.

Carve-out. This allowed broadcasters to deduct all revenues from any programs containing BMI music cleared at the source, or licensed directive from composers, from the revenue base on which their BMI license fee was based.

Not only did the broadcasters show no interest in using this provision but, at their request, it was deleted from the blanket license.

Now, I have to tell you that when this gentleman tells you that nobody would give them anything, the broadcasters themselves took the carve-out out of the agreed upon negotiations between broadcasters and composers. They did it. And now they come and say, oh, my goodness, we cannot do it any more.

Mr. BLUMENTHAL. Mr. Chairman, also there is a major conflict, I think, in a couple of areas.

Mr. Padden, I think—I am going to give him credit because I remember back in the beginning of the panel—I think when he kept bringing up the \$15 million that one station is paying for "Magnum, P.I.," they kept indicating how horrendous that was and how expensive and then, on the other hand, he said if they had source licensing, they would be willing to pay more money so that the composers and the publishers would have a share just for that particular program and not deal with the blanket license.

I think he has made the very eloquent case that in the arm's length negotiations in acquiring syndication rights to the off-network programming they are buying which nobody is holding a gun to their head. They do not have to make an offer for that programming. They do not have to negotiate for it. But when they do, they feel they are paying a high price, they are going to fold in all of the music costs, will not pay any additional money for that music, and no money will be flowing back to the composers and back to the publishers who are putting time and effort in exploiting that music.

I think it is very clear, and Mr. Valenti has made the point quite clear, this is an economic issue for the stations. They are all doing very well; they want to do better. But doing better will be at the detriment of the composers and of the publishers because there will not be that revenue stream there.

Senator MATHIAS. Now we are long overtime here.

Let me ask each side one final question.

What about the people that send us here, people who elect the Members of Congress, to whom we are ultimately responsible, what is the impact of this legislation, in your view, on the general public? Either Mr. Valentino or Mr. Epstien, as briefly as you can.

Mr. VALENTINO. The public interest is served whenever injustice is corrected.

At the House hearings, one of the Congressmen mentioned that John F. Kennedy said, "Well, life is unfair." But just because John F. Kennedy said life is unfair, it does not mean that when there is an opportunity to correct unfairness, we should ignore it.

And here is an ideal opportunity to correct unfairness for a majority of the composers and the publishers in this country. They can make their own deals on source licensing, they can obtain their own performance fees. And in this way public justice will be served.

Senator MATHIAS. Mr. Blumenthal or Mr. Valenti, would either of you comment?

Mr. BLUMENTHAL. I think, in terms of how I perceive it from the producer's standpoint and how it then affects the public, we, as producers, will, if this blanket license is not available, the revenue stream, in my opinion, to composers and publishers will dry up. The total burden of the cost of music will be put on the producer, and because of our deficit at this point being so high, I think we would be required from a business standpoint to use less and less music and to go to sources of music that do not cost the kind of money that it is going to take to hire these very, very valuable composers.

I think the bottom line is that "Miami Vice," the "Hill Street Blues," and the reason that we are now exploiting stereo music in

television is because there is lot of music that is being used will dry up. And we will be doing our programming with less and less music, and there will be less and less composers working.

Senator MATHIAS. Well, on that note, I would like to thank all of the witnesses who appeared here today, who provided us with such an interesting and entertaining morning.

As I noted at the outset of these proceedings, this legislation raises many serious and complicated issues. And for that reason, I am sure that all the members of the committee, not only those who attended this morning, but others who were not able to be here, will have questions, and we will keep the record open so that they may submit questions to witnesses for witnesses' responses.

But because of the somewhat unusual nature of the jurisdiction we have in this case, and because of the fact that there is a May 1 deadline, all responses have to be returned to the subcommittee well prior to that date so that the hearing record can be closed. So I want to warn everybody that we are working under a deadline in this case. It is not the normal situation and I hope that you will adhere to the deadline very rigidly so that the questions and responses can be made part of the record as soon as possible.

The committee will stand in adjournment subject to the call of the Chair.

[Whereupon, at 1:01 p.m., the subcommittee adjourned, subject to the call of the Chair.]

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

Cable Address ASCAP, New York
TWX 7105812084



American Society of Composers, Authors and Publishers
ASCAP Building - One Lincoln Plaza, New York, N.Y. 10023 Area Code (212) 595-3050

Bernard Korman
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212-870-7510

May 3, 1986

Hon. Charles McC. Mathias, Jr.
United States Senate
Russell S.O.B. - Room 387
Washington, D. C. 20510

Re: S. 1980

Dear Senator Mathias:

In his testimony on April 9, Hal David quoted from the Final Order of July 28, 1969, in the United States District Court for the Southern District of New York. That Order terminated the "Shenandoah" proceeding and approved the blanket and per program license agreements which have remained in effect ever since.

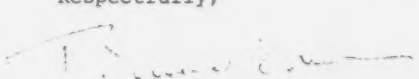
Broadcasters might have terminated these agreements at the end of 1973 but elected to renew and extend them through 1977. They were thereafter extended during the Buffalo v. ASCAP and BMI antitrust suit and the pending proceeding to determine reasonable license fees.

I enclose a copy of the Order, which was entered on consent. Mr. David quoted from the recital (Tr. 99). I call attention to paragraph 1: the fees were judged reasonable and non-discriminatory with respect to the blanket license agreement. Paragraph 1 b refers to the right of the parties to renew and extend the agreements through 1977.

In paragraph 2, the same reasonable and non-discriminatory judgment is extended to the per program agreement which also was permitted to run through 1977.

We respectfully request that the Final Order be included in the record.

Respectfully,


Bernard Korman

BK:j
Enclosure

United States District Court
Southern District of New York

UNITED STATES OF AMERICA,

Plaintiff,

against

AMERICAN SOCIETY OF COMPOSERS,
 AUTHORS AND PUBLISHERS, et al.,

Defendants.

Civil Action
 No. 13-95

In the Matter of the Application of
 SHENANDOAH VALLEY BROADCASTING, INC., et al.,
 Petitioners,
 For the Determination of Reasonable License Fees.

FINAL ORDER

Petitioners, Shenandoah Valley Broadcasting, Inc., et al., (hereinafter "Petitioners") having applied to the Court for determination of a reasonable licence fee pursuant to Section IX of the Amended Final Judgment herein, and the petitioners and respondent having agreed, after numerous hearings and conferences with the Court and lengthy negotiations between the parties and with the aid of the Court, upon forms of license agreement commencing January 1, 1968 and on a basis of payment for the period January 1, 1962 through December 31, 1967, and the petitioners and respondent having agreed that such forms of license agreement conform with the provisions of the Amended Final Judgment herein and that such forms of license agreement may be entered into lawfully by each party to this proceeding, and the entry of this order to carry out and consummate the negotiated agreement they have reached having been consented to, and notice of the settlement of this order having been given to the United States of America,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The following are reasonable and nondiscriminatory fees for the Local Station Blanket Television License Agreement for the periods indicated, and comply with the terms of the Amended Final Judgment entered herein:

a. for the period January 1, 1962 through December 31, 1967 the license fees set forth in the form of Local Station Blanket Television License Agreement in effect prior to January 1, 1962, a copy of which is annexed hereto as Exhibit 1, except that:

(i) for the period January 1, 1964 through December 31, 1967 the sustaining fee shall be 70% of the sustaining fee provided for in subparagraph 5A(a) of such license; and

(ii) for the period January 1, 1964 through December 31, 1965 the commercial fee shall be 2% (instead of 2.05%) of the station's "net receipts from sponsors after deductions" computed in accordance with the provisions of subparagraph 5A(b) of such license; and

(iii) for the period January 1, 1966 through December 31, 1967, the commercial fee shall be 2% of the "station's basic net receipts" and 1% of the "station's increment." For the purpose of this computation, the station's "net receipts from sponsors after deductions" shall be computed in accordance with the provisions of the license annexed hereto as Exhibit 1, and shall be divided between "station's basic net receipts" and "station's increment" in accordance with the provisions of subparagraphs 5E and 5F of the form of Local Station Blanket Television License Agreement annexed hereto as Exhibit 2.

b. for the period January 1, 1968 through December 31, 1977, the license fees set forth in the form of Local Station Blanket Television License Agreement annexed hereto as Exhibit 2, subject, with respect to the period January 1, 1974 through December 31, 1977, to the election by petitioners and respondent to renew and extend such license agreement as provided in paragraph 10 thereof.

2. The license fees set forth in the form of Local Station Per Program Television License Agreement annexed hereto as Exhibit 3 are reasonable and nondiscriminatory fees for the license granted by such agreement for the period January 1, 1962 through December 31, 1967 and for the period commencing January 1, 1968 subject, with respect to the period January 1, 1974 through December 31, 1977, to the election by petitioners and respondent to renew and extend such license agreement as provided in paragraph 13 thereof, and comply with the terms of the Amended Final Judgment.

3. Within thirty days after the entry of this order, respondent shall mail forms of Local Station Blanket Television License Agreement and Local Station Per Program Television License Agreement for the period commencing January 1, 1968 (Exhibits 2 and 3) to each petitioner except those specified in paragraph 5 hereof, together with a letter of transmittal (Exhibit 4), and said petitioner, if it so elects, shall sign and return either of such agreements and letter to respondent at its office at 575 Madison Avenue, New York, N. Y. 10022.

4. Within thirty days after the entry of this order, respondent shall notify each petitioner, except those specified in paragraph 5 hereof, of the license fees payable by such petitioner for the years 1964 through 1967 pursuant to subparagraph 1(a) of this order, based on the amounts reported by such petitioner for such years. In the event that the license fees payable to respondent for the years 1964 through 1967 pursuant to subparagraph 1(a) of this order are less than the interim license fees previously paid by such petitioner for such years, respondent shall notify such petitioner of the refund to which it is entitled. Respondent shall make such refund in accordance with the following provisions:

a. Respondent shall refund to such petitioner (i) not less than 60% of such difference on or before December 1, 1969; (ii) not less than 20% of such difference on or before December 1, 1970, and (iii) any balance on or before December 1, 1971.

b. In the event that a petitioner indisputably owes license fees to respondent, respondent may withhold not more than 50% of the refund which would otherwise be due to such petitioner until such license fees are paid, provided that either party may apply to this Court to determine whether such petitioner indisputably owes license fees to respondent. A finding by the Court in any such proceeding shall be used solely for the purpose of determining whether respondent properly withheld payment of such refund to such petitioner, and shall not constitute a construction of the license for any other purpose or be used or relied upon by either party in any other Court or proceeding.

c. In the event that such difference is not refunded or withheld in accordance with subparagraphs (a) and (b), each petitioner may credit the amount of the refund to which it is entitled against its payment or payments to respondent due immediately after the date on which the refund payment was due.

d. Nothing in this order shall be deemed to modify any settlement between respondent and any petitioner with respect to license fees payable by such petitioner for the years prior to 1968.

5. The provisions of this order shall not be construed as directing respondent to enter into any license agreement with any petitioner which, as of the date of this order, is in default in the submission of reports for more than two months, or has submitted such reports but failed to pay the license fees set forth therein for more than two months; provided, however, that if any such petitioner, within sixty days after written demand by respondent, shall make payment of all such license fees and shall submit all such reports, then respondent upon application shall offer, within a reasonable time thereafter, a license agreement to such petitioner in accordance with paragraphs 1 and 2 of this order, and provided that either party may apply upon notice to this Court for other or further relief as to petitioners which have not made payment of all such license fees and submitted all such reports within such sixty day period.

6. In the event of the failure of any petitioner or respondent to comply with any provisions of this order, the other party or parties may apply upon notice to this Court at the foot of this order for appropriate relief.

7. In the event that respondent and the "All-Industry Television Station Music License Committee" as attorney-in-fact for petitioners and other local television stations similarly situated do not agree on the computations of "basic net receipts" and "increment" applicable to any of the years 1968 through 1977, an application may be made to this Court at the foot of this order for determination of such dispute.

8. In the event of:

a. any major interference with the operations of respondent in the state, territory, dependency, possession or political subdivision in which a particular station is located, by reason of any law of such state, territory, dependency, possession or political subdivision; or

b. any substantial increase in the cost to respondent of operating in a state, territory, dependency, possession or political subdivision in which a particular station is located by reason of any law of such state, territory, dependency, possession or political subdivision, which is applicable to the licensing of performing rights,

respondent may apply to this Court for an order terminating the license of such station.

Dated: July 28, 1969
New York, New York

SYLVESTER J. RYAN
U. S. D. J.

We consent to the entry of
the foregoing order.

July 28, 1969

DONALD SCHAPIRO
Attorney for Petitioners

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Attorneys for Respondent

STATEMENT IN SUPPORT OF S. 1980

Statement of the Spanish International
Communications Corporation, Bahia
de San Francisco Television Company and
The Seven Hills Television Company

In Support of

S. 1980

(Source Licensing Legislation)

Submitted pursuant to request by the
Senate Subcommittee on Patents, Copyrights, and Trademarks
of the
Committee on the Judiciary

April 28, 1986

Spanish International Communications Corporation ("SICC"), Bahia de San Francisco Television Company ("Bahia") and The Seven Hills Television Company ("Seven Hills") are prominent pioneers of Spanish language television. These companies own and operate WXTV/Channel 41 in New York City; WLTW/Channel 23 in Miami; KWEX-TV/Channel 41 in San Antonio; KDTV/Channel 14 in San Francisco; KFTV-TV/Channel 21 in Fresno, California; KMEX-TV/Channel 34 in Los Angeles; and KTVW-TV/Channel 33 in Phoenix. These are all full service Spanish language television stations the oldest of which have, since 1962, provided to Hispanics a broad range of programming, including variety shows, novelas (dramatic series), mini-series, entertainment specials, sports, news and public affairs programming, all in the Spanish language, and instructional programs designed to teach English to Spanish speaking viewers.

The stations' primary goal is to provide to this discrete sector of the viewing public the best of Spanish language programming from throughout the world in addition to locally produced news, public affairs and cultural programs designed by the stations to inform their local communities and to provide a link with their cultural heritage. Hispanic residents in the United States constitute but a single neighborhood in the world community of Spanish speaking people and have strong ties to many Spanish speaking countries. A 1984 study of the Spanish television market by Yankelovich, Skelly and White disclosed that 66% of Hispanics residing in the United States who are 16 years or older were born outside the United States.^{1/} For this reason our stations adopt a global perspective in determining what programming would be of interest to our audiences. For example, last year, in association with the SIN Television Network, not only did the stations provide immediate and exhaustive coverage of the earthquake in Mexico, the volcanic eruption in Colombia and the mudslides in Puerto Rico, but they also quickly organized national telethons which raised millions of dollars to aid the victims of these natural catastrophes -- many of whom were the friends, family, or kinsmen of our viewers. In

^{1/} "Spanish USA - 1984: A Study of the Hispanic Market", at page 15.

1984, five of the stations sponsored the first Immigration Reform Conference, bringing national Hispanic leaders together to discuss immigration reform and related issues. The stations broadcast coverage of political elections in such countries as Peru, El Salvador and Guatemala, and cater to their audiences' insatiable appetite for soccer by carrying live the World Cup Soccer Championship. Also, the stations annually host and broadcast the national music competition to select the United States' entry for the international "OTI" competition. The Organizacion de Television Iberoamericana is an international organization of Spanish and Portuguese broadcasters which each year selects the best original composition in a program.

Music plays a significant role in defining and distinguishing Hispanic cultures. Moreover, in the same way that music enhances the television programs of our English language competitors, music plays an integral role in television programs broadcast by our stations as well. Consequently, we have followed closely the debate over the proposed source licensing legislation between local television stations and those who have supported the licensing societies to maintain the status quo.

SICC, Bahia and Seven Hills fully support the testimony previously submitted to the Subcommittee regarding the fundamental inequities of the current blanket licensing scheme.^{2/} The fundamental flaw in the blanket licensing system is that it precludes consideration of those marketplace factors which would ensure that value is actually received for money paid. As it is currently orchestrated, this system "thumbs its nose" at the marketplace. The license fees which local television stations are required to pay explicitly preclude consideration of the quality of the music, the role of the music in the programming, the popularity of the program or the amount of music actually used by the stations.

According to the licensing societies, consideration of these factors is irrelevant since the blanket licensing scheme is

^{2/} On April 9, 1986 such testimony was presented by the Honorable Rick Boucher, the National Association of Broadcasters, the All-Industry Television Licensing Committee, the Association of Independent Television Stations, Inc., Tom Valentino and Fred Epstein.

patterned after a "library system," which -- for a flat fee -- provides the station unlimited access to and use of all titles in the repertoire. This is hardly a satisfactory arrangement, however, especially in our experience when the "library" does not include much of the music our stations would tend to perform. For example, 45% of the network programming ultimately broadcast by our stations is supplied from Mexico and includes a great deal of the work of Mexican composers. Recently, the stations were informed by the Mexican music licensing society, Sociedad de Actores y Compositores de Musica, S.A., that it had transferred its entire catalogue from BMI to ASCAP. This transfer substantially depleted the BMI "library" of much of the music which the stations would ultimately perform. Clearly, the potential value of the BMI license to the stations has been diminished and does not continue to support -- if it ever did -- the blanket license fee demanded.

In this same vein, the recent testimony of the licensing societies themselves gives cause to question the true value of the access to the works of the more than 84,000 composers they claim^{3/} to represent. In response to claims of proponents of the source licensing legislation that only 6% of the membership of the licensing societies receive 95% of the license fees distributed, the societies testified during the April 9th Subcommittee hearings that the majority of their members are amateurs or hobbyists whose works would probably never see the light of day. Query then the value of the breadth of these repertoires when the vast majority of these compositions are unlikely ever to be used. Equity compels that the value of any composition should be determined in the marketplace rather than solely as a function of a stations' profitability. Outstanding news and sports figure largely in our station's profitability but neither include ASCAP or BMI music. There is no plausible reason that the revenue from these programs should be figured into the base from which licensing fees are calculated. Moreover, as it is now done with films, it is simply a contractual matter between the

^{3/} In response to repeated requests to the licensing societies for an actual listing of their works, the stations have been informed that such a document would be too lengthy to provide. It is hard to know, consequently, precisely what works they represent.

composer and the producer as to the amount and the manner in which the composer will recoup from ASCAP or BMI royalties from the use of music in programs which attain unexpected popularity.

Contrary to the testimony of the opponents of S. 1980, the public interest would be served by substituting a market-based pricing system, as required under S. 1980, for the current arbitrary and inflexible blanket licensing system. The purpose of the copyright laws is to provide economic incentives to stimulate creativity. Thus, we reward the author to encourage public release of the products of his or her creativity. The current blanket licensing system is seriously flawed for many reasons, including the fact that it does little to encourage or stimulate creativity. In fact, in many ways, the blanket licensing system actually frustrates the public interest purpose to be served by the copyright laws. The price paid for music is totally unrelated to either the quantity or the quality of the music used. It is no more expensive to obtain truly original, creative, significant music in a prime time popular show than it is to obtain mechanical, routine background music. Moreover, if both shows are equally successful, the copyright owners are compensated the same, regardless of the quality of the music. Compensation is linked to the popularity of the show, not to the value or originality of the music. A television show is generally popular for any variety of reasons, often unrelated to the music. Under the blanket licensing system, if the show in which the music is used is a hit due to the popularity of the actors or the quality of the script, the copyright owners will be paid very well. If, on the other hand, the show has extremely creative music, but is otherwise a flop, and receives low ratings, the copyright owner may receive nothing. The role of music in making a particular show valuable may be insignificant, yet, if the show is a hit, the copyright owner is rewarded handsomely. This system does not stimulate or promote musical creativity. With a source licensing system, the competitive marketplace will determine the price to be paid. This type of free market negotiation will reflect the true value and quality of the music.

Moreover, it is ultimately in the public interest to promote competition in a free market. Justice Stevens, who dissented

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 25 (1979), recognized the harmful anticompetitive nature of the blanket licensing system. He stated that this system "is a classic example of economic discrimination. The record plainly establishes that there is no price competition between separate musical compositions." BMI v. CBS, 441 U.S. at 31-32 (footnote omitted). He further observed that competitive markets exist for "synch" rights and, in the motion picture industry, for performing rights. Thus, he concluded: "the record demonstrates that the market at issue here is one that could be highly competitive, but is not competitive at all." Id. at 33.

Opponents of the legislation claim that there exist practical and readily available alternatives to the blanket licensing system. They also claim that the true motivation of the bill is that broadcasters do not want to pay for the music they use. Both claims are unsupported and untrue. Local stations expect and intend to pay the marketplace value of music actually used, but the vested interests of the affected parties conspire to deprive local stations of any realistic alternative to the blanket licensing system. However, as we support the testimony of the other proponents of S. 1980 previously submitted to the Subcommittee and believe that it adequately addresses these and other spurious claims by opponents of the legislation, we will refrain from burdening the record with comments likely to be redundant. We believe, however, that a brief profile of our stations' operations, while somewhat unique, will serve to demonstrate the fundamental inequities of a system which creates a totally arbitrary and artificial nonmarket-based pricing structure for music and which does in fact victimize local television stations.

The local television stations owned by SICC, Bahia and Seven Hills are atypical in that they exercise extensive control over the music content of their local productions. Accordingly, they broadcast an infinitesimal amount of programming which requires them to secure local performing rights licenses from ASCAP and BMI. Despite this, the stations are expected to pay a full, standardized blanket license fee. The fact is that, aside from the local programming, news and public affairs programming -- all of which the stations

produce without ASCAP or BMI music -- the remainder of the stations' broadcast programs are filled with network programming.^{4/} Moreover, the majority of local commercials broadcast by the stations are also produced in-house, and, thus, are controlled locally to avoid the use of ASCAP or BMI music. The only programming in which ASCAP or BMI music might be included is the occasional syndicated program or the few local commercials not produced by the stations. Nonetheless, for these few local commercials and syndicated programs, ASCAP and BMI would have the stations pay license fees which bear no rational relationship to this limited use.

A recent survey of our stations documents the minuscule amount of our total broadcast time which might contain some ASCAP or BMI music. The following information reflects, by station, the amount of total broadcast time that includes syndicated and non-locally produced commercial time:

Station	Locally Prod. Programs & Commercials	% of Total Broadcast Time		Total Which Might Contain ASCAP or BMI Music
		For Synd. Programs	For Nonlocally Prod. Commercials	
WXTV	5%	3%	.8%	3.8%
KMEX	8%	.9%	10%	10.9%
WLTV	8%	0	6%	6.0%
KWEX	4%	0	6%	6.0%
KFTV	5%	0	2%	2.0%
KDTV	16%	0	.2%	.2%
KTVW	3%	.4%	.3%	.7%

It should be noted that, except for KDTV, the data on non-locally produced commercial time includes a significant amount of time which contains no music whatsoever. Essentially, these figures reflect

^{4/} All the stations of SICC, Bahia and Seven Hills are the affiliates of the SIN Television Network ("SIN"), owned by SIN, Inc., a U.S. corporation. SIN employs a satellite to provide simultaneously to its 383 affiliates entertainment programming, national and international news and special features. SIN purchases the best Spanish language programming available from program suppliers in Mexico, Chile, Argentina, Venezuela, Spain, Puerto Rico, and Brazil. For more than a year, SIN has been engaged in negotiations with ASCAP and has secured an interim network license which covers music in all network programming and commercials exhibited by its affiliates. SIN has recently commenced similar negotiations with BMI.

the 6 minutes per hour that is available for locally produced commercials. In fact, not all of this time is sold and some is used to schedule public service announcements and promotional announcements. Since the stations produce all promotional announcements without ASCAP or BMI music, little of this time includes any music which could be claimed by these societies. Thus, these figures actually overstate the amount of our total broadcast time which might include ASCAP or BMI music.

In addition, all of our stations contract with independent music libraries in the competitive free market to obtain original or special music for their locally produced programming. In all cases, the fees negotiated for music from independent libraries is far less than the fees set by ASCAP and BMI. The differences are staggering, particularly when compared in terms of the amount of our broadcast time devoted to locally produced programs and commercials (in which the independent music libraries' music is used) and the amount of our broadcast time devoted to syndicated and non-locally produced commercials (which might include ASCAP or BMI music). For example:

o The monthly ASCAP and BMI fees set for KMEX equal \$21,264 for music which might be used in 10.9% of the stations' total broadcast time. In contrast, KMEX pays \$233/month for music it uses in its locally-produced programming, i.e. 8% of its total broadcast time;

o The monthly ASCAP and BMI fees set for WLTV equal \$13,478 for music which might be used in 6% of its total broadcast time. In contrast, WLTV pays \$1,500/month to independent libraries, and to individuals who compose original music for the station's locally-produced programming, which accounts for 8% of its total broadcast time;

o The monthly ASCAP and BMI fees for WXTV equal \$8,742 for 3.8% of its broadcast time. In contrast, WXTV pays an independent library \$388/month for music used in 5% of its broadcast time.

It is precisely because these license fees are so excessive relative to the music actually used that the stations have, since January 1, 1986, ceased using ASCAP or BMI music in any programs they produce.^{5/} KFTV broadcasts no syndicated programming whatever. Moreover, it produces 50% of its local commercials.

^{5/} The stations have for years abstained from using ASCAP music in their productions both of programs and commercials. While the stations had license agreements with BMI through December, 1985, they decided to cease using BMI music due to the excessive license fees.

There is no reason why KFTV should contribute a flat percentage of its revenues to assist in compensating the composers of the Rockford Files, Toma, or the Mary Tyler Moore Show. The bald truth is that these stations have limited need for any license with ASCAP or BMI. For years, the stations have hired original composers in order to help customize the image of the station. Recently, when KTVW wanted mariachi music to enhance the appeal of certain locally produced commercials, it did not resort to the libraries of ASCAP or BMI. Instead it hired local Mexican composers to originate a score.^{6/} Additionally, the stations have negotiated license agreements with independent libraries. The stations have been exploring with both licensing societies the possibilities of reasonable local licenses which would protect the occasional syndicated program and local commercials which the stations do not produce.

While the opponents are correct in stating that there is a procedure by which a station can contest the ASCAP blanket license fee, this procedure is neither a substitute for the free market nor is it an effective, viable remedy for our stations. Indeed, it is prohibitively costly and burdensome for a station to initiate and complete an action before the U.S. District Court for the Southern District of New York. Not only is this procedure burdensome and costly, its essential purpose and goal is to divine what the free market value of music is. This purpose can best be served by allowing the competitive marketplace to function. The federal court process is an artificial, burdensome, and ineffective substitute for the marketplace. Moreover, it is a meaningless remedy for our stations and many others because of the significant costs involved. It is inappropriate to implement costly judicial machinery to do what can most effectively, efficiently and fairly be done in the free market.

Opponents of the source licensing legislation also claim that there exist various alternatives to the blanket licensing

^{6/} We believe that the current system is an impediment to marketplace competition among composers. The excessive fees extracted from broadcast operations eliminates the incentive and financial ability of local stations to hire local composers since they are already paying extravagant fees to ASCAP and BMI.

system. Our experience demonstrates that this is not the case. These so-called alternatives are merely illusory options. Like other local television stations, we are prevented from negotiating a source license with the suppliers of the few syndicated programs we broadcast because they are not empowered or otherwise authorized to negotiate such a license. As recently discussed in testimony before the Subcommittee on April 9th, the fact is that the current blanket license system eliminates any incentive for the supplier even to raise this matter with the producer or for the producer to consider it. In theory, a direct license is available to the stations, but our experience has shown that such a direct license is impractical to effect as there is no realistic way to negotiate a license with composers of music included in commercials which are submitted to the stations daily for broadcast within hours of their delivery. Finally, our syndicated programs include sports and other such programs which contain little or no music. Consequently, a per program license which makes the societies' entire library of over 4,000,000 titles available for use in a program in which music is incidental and infrequent is not a reasonable alternative.

Moreover, the immense bargaining leverage which ASCAP and BMI impute to each local television station does not exist. While it may be possible to threaten to cease doing business with suppliers of foreign syndicated programs who do not provide music performing rights, this is not the case with local commercial advertisers on whom our stations are directly dependent for income. While the existence of a Spanish market has been substantiated, advertisers are still tentative about "buying Spanish." Consequently, a request from our stations alone that local advertisers clear music performing rights presents a convenient reason to advertisers to forego advertising on local Spanish television stations.

CONCLUSION

The blanket licensing system essentially fails to promote, and in fact frustrates, the fundamental purpose of the copyright laws. It rewards composers and other copyright owners not on the basis of their musical creativity, but on the basis of an imperfect sampling procedure which merely measures the popularity of a televi-

sion program. The value of the music to that program's success is not measured and often is irrelevant.

Moreover, this inflexible all-or-nothing system extracts a price for music which bears no relationship to either the quantity, quality or value of the music actually used. It operates in a completely non-competitive marketplace. This market is clearly dominated by two licensing societies, ASCAP and BMI. Suggested alternatives to this system are purely illusory. Our stations and other relatively small buyers are not powerful enough to exercise any bargaining power with either the music licensing societies or the major Hollywood studios. They are thus totally foreclosed from a competitive market or any alleged alternatives to the blanket licensing system.

Accordingly, this system does not serve the public interest or the basic purpose of the copyright laws. Passage of S. 1980 would remedy this unbalanced situation by replacing an artificial, arbitrary, inflexible non-competitive pricing system with one based on the traditional pricing factors of free market competition -- the product's value, quality and quantity.

STATEMENTS IN OPPOSITION TO H.R. 3521 AND S. 1980

COMMENTS OF THE
AMERICAN ASSOCIATION OF ADVERTISING AGENCIES
IN OPPOSITION TO
S. 1980

The American Association of Advertising Agencies, Inc. (the "A.A.A.A."), the national association representing more than 700 advertising agencies nationwide, opposes enactment of S. 1980. That bill constitutes blatant special interest legislation being urged by broadcasters to relieve themselves of their obligations under the existing music licensing system for televised advertising -- a system which has functioned smoothly for decades and has been repeatedly affirmed as appropriate by the courts.

The provisions of S. 1980 prohibit the transfer of performance rights for any copyrighted audiovisual work without conveyance of the right to perform the accompanying music. Significantly, proposed subsection (b) of the bill makes that prohibition expressly applicable not only to broadcast programming, but also to commercial advertising. Instead of the current system, which is the result of competitive forces, the bill would place every one of the thousands of televised advertisements broadcast daily under an artificial stricture.

A.A.A.A. members create and place more than three-fourths of all national advertising handled by advertising agencies, including by far the majority of all advertisements appearing during televised broadcasts. They are therefore in a unique position to evaluate the present music licensing system as it applies to commercial advertisements. Enactment of S. 1980 will inevitably cause administrative chaos in music licensing for televised advertising, higher costs to

advertisers, lower payments to composers, and less use of music in television advertising.

Under the present system, which has evolved over more than five decades, advertisers and their advertising agencies act somewhat like program producers for their commercial advertisements. A vast majority obtain merely a license for use of music pertaining to the creative process under their supervision: i.e., a license to synchronize the work in relation to the visual material of the commercial. Thus, the vast majority rely on the broadcasters to obtain the necessary performance rights for the music; the broadcasters are the entities who "perform" the music by airing the commercial.

Broadcasters have for decades chosen to obtain blanket licenses from ASCAP and BMI in order to gain performance rights for all the music in the respective collections of those groups. Particularly in connection with commercial advertisements, such unlimited access to repertoire minimizes transaction costs and is convenient for both the composers and the broadcasters. Indeed, broadcasters have argued that, given the many shows and advertisements using music, the blanket license is the only licensing option which can avoid overwhelming licensing costs and administrative chaos.

Yet S. 1980, by mandating "source licensing," seeks to place upon advertisers and their agencies precisely the administrative burden which the broadcasters have considered unreasonable. Passage of S. 1980 will upset existing contracts, disrupt a long-standing and efficient system, and require costs for initial set-up and continuing administration which will be enormous.

The huge number of commercial advertisements using music guarantees that these effects will be magnified in the advertising area. Advertisers and their agencies will be compelled to search the globe to locate the composer and

engage in an individualized negotiation if they wish to use a particular piece of music on the air. Given the large number of commercials for production (and for potential production), such a task will overwhelm the process, promising to increase commercial production costs significantly.

Indeed, many advertisers and agencies may conclude that the only practical option available to them will be not to use outside music at all. In the context of commercial advertising, the resulting inhibition could lead to advertisements of much less utility, for jingles and other accompaniments add immeasurably to a selling message. Moreover, the higher costs of obtaining the necessary licenses for music may preclude smaller advertisers from initiating broadcast advertising campaigns within the law's constraint -- to the detriment of competition and, ultimately, the public.

Even if composers may be found and licenses obtained by an advertiser or its agency, the system mandated by S. 1980 will serve to undercut fair compensation of composers. Producers of advertisements currently pay relatively modest "up front" fees for synchronization rights, with a composer's real return for his talent coming in the form of performance payments -- large if the commercial is broadcast frequently, smaller if the commercial is broadcast less often. Such a payment system is fair to everyone, for it rewards composers for what is the best measure of their talent: the number of public performances.

It is significant that the Federal Government's spokesperson on copyrights, Mr. Ralph Oman, the Register of Copyrights, has publicly opposed S. 1980. His recent testimony to this Subcommittee explained in detail that the Copyright Office -- whose objectivity in this regard is beyond dispute -- is

"concerned about the wisdom of passing such a drastic measure [as S. 1980] at this time. . . ."

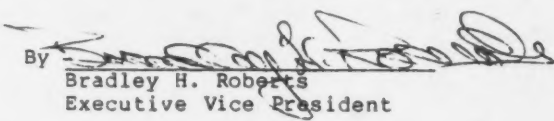
That conclusion is entirely in accord with the decisions of courts which have reviewed the notion of blanket licenses and found that the broadcasters have been unable to show that the present system is unreasonable or anticompetitive. To the contrary, the U.S. Supreme Court explicitly found that the present system of blanket licenses results in "substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers." BMI v. CBS, Inc., 441 U.S. 1, 21 (1979).

The licensing of music for broadcast in television commercials has operated smoothly for decades under the system which exists today. That system is the result of complex competitive forces clashing in the finest traditions of the free enterprise system. One special interest group -- the broadcasters -- now seeks to use S. 1980 to inject the Congress into the midst of that system in order to create a closed marketplace in their favor. The A.A.A.A. opposes that attempt. Congress should refuse all attempts to legislate a single way of doing business to the exclusion of other options.

The music licensing system has long operated for the benefit of all concerned. Congress should permit it to continue to do so.

April , 1986

AMERICAN ASSOCIATION OF
ADVERTISING AGENCIES, INC.

By 

Bradley H. Roberts
Executive Vice President

1899 L Street, N.W.
Washington, D.C. 20036

Statement opposing H.R. 3521 and S. 1980

by David A. Bell, composer

March 18, 1986

This is a moral issue. It is about retaining the intent and integrity of the copyright laws. If these bills pass, great harm will come to young composers like myself whose primary source of income is from writing music for television. We will be the victims.

Before beginning any serious discussion of this matter we must all agree that composing the musical underscore for a television program or theatrical film is a creative process. The composer is co-author of the work and therefore deserves all the copyright protection provided by law.

Film music not only enhances the dramatic content and momentum of a work, but can often signal a point of drama that doesn't even exist on the screen. One of the most well-known examples of this is in the score John Williams wrote for the movie, "Jaws". Try to look back with your mind's eye to the visual content of the film: the camera slowly pans across a calm ocean on a sunny day - there is hardly a ripple on the water. Now try to imagine in your mind's ear the relentless "bom-bom-bom-bom"  of the shark's theme. We see no fin, no dark shape moving beneath the surface. It is the music, and only the music, that tells us it's not safe to go into the water. That was a brilliant creative decision by Mr. Williams and I'm sure it took a great deal of hard work to formulate it. This same principle of musical creativity works in television.

Creating musical underscore for films and television is a specialty area of music composition which requires a great deal of training and experience. When I write the music for "Murder She Wrote" or "Blackie's Magic", my task is at least to clarify, and sometimes actually create, the dramatic content of a particular scene. It has to be done with precise chords, melodies, tempi, dynamics, choice of instruments, etc., and must fit the scene exactly. The allowable time tolerance is two tenths (2/10) of a second or the music is no longer synchronized with the action on the screen.

I learned the technical aspects of film scoring while doing my graduate study at the Eastman School of Music in Rochester, New York. The course required two to three hours of work per week per semester. Although it's impossible to compress that amount of technical information into the time limitations here, the April 6, 1986, segment of the CBS News Sunday Morning hosted by Charles Kuralt will air a feature piece following me through the entire process of scoring an episode of "Murder, She Wrote". I think that watching this program will give you a better idea of what I do for a living.

Learning the dramatic considerations of film scoring is an ongoing process. Every film I see, every play I attend, every story I read, every score I write improves my dramatic insight. Time and experience are what make a good film composer.

Now for the financial realities of the television composer. Only a very few ever become millionaires. A steady, secure position in the industry is, for all practical purposes, nonexistent; it's usually a week-to-week verbal commitment from the producer. I'm fortunate to have one of the most secure positions in television. The job has required me to work almost seven days a week for the past six months at an average of twelve to fourteen hours a day. However, the production season will end in mid April and it's very possible that I'll be unemployed for five months. That period of unemployment could become much longer should any of the shows' stars become incapacitated or the network cancel the show. I could be back to painting houses for a living as was the case three years ago. That's unlikely, but I'm pointing out the fact that the financial existence of most composers

fluctuates wildly. The quarterly checks from ASCAP, BMI or SESAC are the only factors which give our lives any semblance of financial stability.

I'd like to describe the actual financial figures of the television composer's life. I'll use round numbers which represent the average case. For delivering the music for an hour-long dramatic show, a composer receives a salary of about \$3,000.00. In most cases, this figure includes conducting the recording session and orchestrating (orchestrating is the art of selecting specific instruments to play specific notes of the chord or melody). The rates for conducting and orchestrating are set by the musician's union (American Federation of Musicians) and for the typical show add up to about \$2500.00. Even though all composers belong to the AF of M, we are protected only as orchestrators and conductors. As composers, we have no union protection and so our fee is whatever is left over, which, in this case, is \$500.00. In reality, it's often much less and sometimes we're theoretically in the red should the orchestration and conducting be more than \$3000.00. I'm able to compose about four minutes of music in a twelve-hour day. Therefore, to write the average of twenty minutes of music required in an hour show would take me approximately five days or sixty hours of work. That comes to about \$8.30 an hour. It's less than I would make as a house painter and is certainly not a true reflection of my contribution to the success of the television show.

I don't mind making those low wages because I'm using my skills and time to invest in the future of the show. The copyright law assures me that as co-author I will receive royalty payments from the performing rights money collected by ASCAP or the other options currently available. I receive no royalty payments from orchestrating and conducting and that's as it should be, for they are interpretive functions. However, the creative contribution I make to the show is best rewarded through the present system. It's the most fair and efficient manner of receiving payments each time my music is performed publicly.

If the principle of this bill were applied to the literary world, it would be the equivalent of a book publisher paying a one-time fee to a young author based on, say, the projected sale of 10,000 books, then never paying that author another penny even if a million copies are sold. I think most of us would agree that such a scenario would be unfair and exploitative. This bill would harm composers and lyricists just as much.

I hope this explanation has clarified both the process of composing film scores and the impact this bill would have on the average composer. The artists' struggle to end the exploitation of their original work has lasted for centuries and to allow this bill to become law would be a regression away from the lawful, fair and civilized system that has evolved.



AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION

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Telephone (703) 521-1680

April 8, 1986

Honorable Charles McC. Mathias
Chairman, Subcommittee on Patents,
Copyrights and Trademarks
Judiciary Committee
United States Senate
Washington, DC 20510

Re: S. 1980 (Star Print)

Dear Mr. Chairman:

The American Intellectual Property Law Association (AIPLA) is a national bar association of more than 5,300 lawyers engaged in the practice of patent, trademark, copyright, and other forms of intellectual property law.

The AIPLA Board of Directors unanimously approved the following Resolution upon the recommendation of the Association Committee on Copyright Matters:

RESOLVED, that the AIPLA opposes in principle legislation which would force a particular type of licensing practice on creators and copyright owners of musical compositions whose works are broadcast, and specifically opposes the enactment of H.R. 3521, 99th Cong. 1st Sess. (1985).

The star print of S. 1980 is identical in substance to H.R. 3521. Therefore, the Association position on S. 1980 is the same as on H.R. 3521.

Laws regarding the ownership and use of property must always be balanced by consideration of the public welfare. The purpose of the Copyright Law is to encourage both creativity and the public dissemination of original works. This balance between the rights of copyright owners to their property and the public welfare must be maintained by Congress.

S. 1980 raises at least the following three questions. Do current music licensing practices in this situation deter or prevent the dissemination of original works of music to the public? If yes, is the damage to the public interest of such a magnitude that Congressional intervention is required? Government interference with personal property rights deprives copyright owners of the right to freely use their property. Such a serious action would only be justified, in our view, if the harm to the public is both clearly demonstrated and grievous. Our final question is whether S. 1980 is a fair and effective response to the problem?

The Association consideration of this bill did not include an analysis of the economic relationships among and between the creators and owners of copyrighted music, the performing rights organizations, the many components of the television broadcasting industry and the motion picture and television program producers. We only recognize that these parties are well established entities and possess the ability, legal and

otherwise, to deal with each other. This is not a situation where the operation of the law in the free marketplace is frustrated by the clear inability of a party to use it. While all these parties may not have positions of equal economic power, there are many existing situations involving the licensing of intellectual property where a more severe disparity of bargaining position does exist between the parties. Therefore, we do not share the view that the broadcasting industry is unable to negotiate reasonable licensing contracts for music to such a degree that help from Congress is needed.

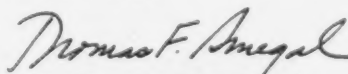
While we leave to the Subcommittee to determine to what extent the interests of broadcasters in this matter and the public interest coincide, we believe that help from Congress can only be justified as an aid to the public. In our view, Congressional help should not be used to increase the profitability of any industry. Congress does not usually referee specific economic disputes between private sector organizations. Laws of general application are formulated to govern business behavior so that the public interest is protected. Specific disputes are settled in the courts.

The antitrust laws have traditionally been used to challenge the lawfulness of practices employed by intellectual property owners to commercialize their property. The courts have upheld the existing system of music licensing at issue here in the face of repeated challenges by the broadcasting industry; BMI v. CBS 441 U.S. 1 (1979); Buffalo Broadcasting Co., Inc. v. ASCAP, _____, 744 F.2d 917 (2nd Cir. 1984) cert. denied, _____ U.S. _____, 53 U.S.L.W. 3587 (1985). We do not suggest the decisions of the courts in these cases should replace the judgement of Congress. However, the cases clearly do not offer support for S. 1980 on the ground that current licensing practices are not in the public interest because of their anticompetitive nature. Nor do these decisions suggest that some problem exists here that is beyond the reach of the antitrust laws.

For the reasons above, we believe that congressional action is not warranted. As to S. 1980, we find it objectionable on several grounds. If enacted, there would be only one lawful method to license performing rights. All others would be illegal. For example, it would be unlawful for a creator and copyright owner to license performing rights directly to a television broadcaster. Furthermore, the bill would require that performing rights could not be lawfully licensed without also simultaneously licensing "synchronization" rights in the work. As the Subcommittee well knows, the "synchronization" right derives from the right to reproduce the copyrighted work in copies, 17 U.S.C. Section 106(1) while the public performance right derives from 17 U.S.C. Section 106(4). Congress recognized these rights as being separate and distinct for equitable and practical reasons. S. 1980 would be unfair to the copyright owners affected. It would also be a highly negative precedent for all owners of intellectual property. Severe limitations on use such as this are not and have never been a part of United States patent, trademark, or copyright laws and should not be.

We hope our views will assist the Subcommittee consider S. 1980. We would also appreciate your including this letter in the hearing records.

Sincerely,



Thomas F. Smegal, Jr.
President

TESTIMONY OF EZRA LADERMAN, PRESIDENT,
NATIONAL MUSIC COUNCIL,
BEFORE THE SENATE JUDICIARY COMMITTEE
SUB-COMMITTEE ON PATENTS, COPYRIGHT AND TRADEMARK
APRIL 9, 1986

Mr. Chairman, distinguished committee and sub-committee members,

My name is Ezra Laderman and I am the President of the National Music Council. The National Music Council was founded in 1940 and chartered by Congress in 1957. Its purpose is to provide a forum for the free discussion of this country's national music affairs and problems, to act as a clearing house for the joint opinion and decision of its members, and to work as a force to strengthen the importance of music throughout the country. The membership of the Council comprises more than fifty national music organizations, encompassing every important form of professional and commercial musical activity. A list of the Council's members is attached.

I submit this testimony as a result of a vote of the Council in favor of the attached resolutions in opposition to S.1980. It is the position of our members, who represent every kind of musician and musical organization from symphony orchestras to community music schools, organists to recorder players, that this legislation poses a grave threat to all who love music or make it their profession.

If I may, I would like to personalize this issue for you, and share with you my impressions of the potential impact of this legislation. While the experiences I am going to relate are my own, I believe they illustrate fairly why the members of the National Music Council view S.1980 as detrimental to their diverse interests.

In addition to having served as director of the music program at the National Endowment for the Arts from 1979 to 1982, and as President of the American Music Center, I

am an active composer. My work has been performed by the New York Philharmonic, the Philadelphia Orchestra, the Chicago Symphony, the Los Angeles Philharmonic and many other orchestras. In addition to my work having been performed by these wonderful organizations, for many years I earned my livelihood as a composer of music for television. It is my fear that S.1980 will make it more difficult for future composers to make their livings as I have.

I began writing music for the CBS Television Network in 1959. In that year I received a commission of \$600.00 for the composition of a half hour television opera. For the first repeat of the program I received \$300.00, and for the second, \$150.00. For subsequent broadcasts I received no remuneration. As reflected by my fees, my bargaining power with the networks was minimal, even after 20 years of successful writing for television. In those 20 years I never received a fee of more than \$1,200.00 for any work-some of which took as long as a year to write. However, I was able to make a reasonable living from my labors and that was due to the existence of the blanket license. From ASCAP, of which I am a member, I received sufficient income for the performance of my work over the years to support a family and to continue composing. My experience is equally relevant to those who compose for syndicated television programming.

The entire world buys and loves American music, and the current system of licensing music performance rights, the most important right a composer like myself has to sell, is an essential element to that current health of American music. It is my opinion, and I believe that the music community generally shares this view, that the current system by which local TV stations and networks pay for music performing rights is fair, enables important American composers to continue their work, and is an element in the health of American musical life-a musical life that is the most dynamic in the world.

Without the option of the blanket license it seems to me that because of the logistics involved, the producers of television programming will be unable to adequately compensate composers for the performances of their music. S.1980 is tampering with a system that works well. The results of outlawing the local station blanket license will be uncertain. One result which we fear is that many talented people who are now composing will be forced to leave the profession because they will be unable to make it economically as composers if they are deprived of their present level of performing rights income. And isn't that what this debate is all about-finding a legislative means of shrinking performance rights income to composers?

All of us in the music community recognize the importance and fairness of the performing rights licensing system. We recognize that the system enables composers to make a living at their work. We also recognize that the system also enables music publishers to take more chances and publish the work of composers of artistic merit whose work would perhaps not be economically viable.

The level of remuneration of composers for their work affects every music teacher, every television viewer, every instrumentalist or singer, whether amateur or professional, every minister of music and church organist as well as the opera companies and orchestras that are such an important part of American cultural life. We all recognize the debt we owe to the Aaron Coplands, the John Williamses and the Philip Glasses. Their music touches every life to which music is important, and the vast membership of the members of the National Music Council is testimony to how widespread and significant musical activity is in this country. Walt Whitman spoke for all of us when he "heard America singing", because music is such an essential part of American life. And because of the negative impact we foresee

from the outlawing of the blanket license for local television stations, the National Music Council is opposed to this bill.

* * *

RESOLUTION

The following resolutions were adopted by the National Music Council:

WHEREAS, there has been introduced into the United States Congress a bill to amended title 17 of the United States Code to prohibit the conveyance of the right to perform publicly syndicated television programs without conveying the right to perform accompanying music, entitled H.R. 3521/S. 1980; and

WHEREAS, this piece of legislation will result in the elimination of the so-called "blanket license" for music used in connection with the telecast of syndicated programming on independent television and the legislative imposition of a source license in its stead; and

WHEREAS, elimination of blanket licensing for musical compositions for use in connection with the telecast of syndicated programming on independent television stations would unjustly deprive the composers of such music of a substantial portion of their livelihoods;

NOW THEREFORE BE IT RESOLVED, that it is the position of the National Music Council that H.R. 3521/S. 1980 is not in the national interest because it creates disincentives for the continued creation of new American music, and because it threatens the financial well-being of the American composer and therefore threatens the vitality of the entire American music community; and

BE IT FURTHER RESOLVED, that the member organizations of the Council will hereby do everything in their power to encourage their members to inform the members of Congress of their opposition to H.R. 3521/S. 1980 and that a copy of this Resolution will be mailed to each member of Congress


ANA

 ASSOCIATION OF NATIONAL ADVERTISERS, INC.
 155 EAST 44TH STREET, NEW YORK, NY 10017 • (212) 697-5950

STATEMENT OF
 THE ASSOCIATION OF NATIONAL ADVERTISERS, INC.
 TO THE
 U.S. SENATE JUDICIARY COMMITTEE,
 SUBCOMMITTEE ON PATENTS, COPYRIGHTS & TRADEMARKS
 FOR HEARING ON S.1980
 APRIL 9, 1986

The Association of National Advertisers, Inc. (A.N.A.) appreciates this opportunity to present its views in opposition to S.1980. A.N.A. represents the majority of major national advertisers and many smaller national advertisers as well, and its membership, which includes more than 400 corporations and 2,000 subsidiaries located throughout the United States, has a major interest in this issue.

S.1980, if passed by the Congress, would impose a single rigid system of licensing music performance rights for non-network commercial television. A.N.A. strongly opposes the imposition by the Congress of a mandatory inflexible method of music licensing. In testimony presented on March 19, 1986 to the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, Ralph Oman, Register of Copyrights, stated concerning nearly identical legislation that, "The Copyright Office is concerned about the wisdom of passing such a drastic measure at this time..." A.N.A. fully concurs.

The interplay of the competitive marketplace presently determines how music performance rights are licensed. A.N.A. urges that this competitive marketplace be left undisturbed by the Congress. This position is in A.N.A.'s own self interest. But, also, it is clearly in the public interest.

In fact, that was the determination made by the United States Supreme Court after intense deliberation and analysis in Broadcast Music, Inc., et al. v. Columbia Broadcasting System, Inc., et al., 441 U.S. 1 (1979), Justice Stevens dissenting. The Court held, at page 20, that blanket licensing of copyrighted music was "designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" (Citations omitted.)

In the course of reaching that ultimate conclusion, the Court observed:

With the advent of radio and television networks, market conditions changed, and the necessity for and advantages of a blanket license for those users may be far less obvious than is the case when the potential users are individual television or radio stations, or the thousands of other individuals and organizations performing copyrighted compositions in public. But even

for television network licenses, ASCAP reduces costs absolutely by creating a blanket license that is sold only a few, instead of thousands, of times, and that obviates the need for closely monitoring the networks to see that they do not use more than they pay for. ASCAP also provides the necessary resources for blanket sales and enforcement, resources unavailable to the vast majority of composers and publishing houses. Moreover, a bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established.

This substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers, differentiates the blanket license from individual use licenses. The blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product. The blanket license has certain unique characteristics: It allows the licensee immediate use of covered compositions, without the delay of prior individual negotiations and great flexibility in the choice of musical material. Many consumers clearly prefer the characteristics and cost advantages of this marketable package, and even small-performing rights societies that have occasionally arisen to compete with ASCAP and BMI have offered blanket licenses.

Id., pages 21-22.

The conclusion was reiterated five years later in Buffalo Broadcasting Company, Inc., et al. v. American Society of Composers, Authors and Publishers, et al., 744 F.2d 917 (2d Cir. 1984), cert. den. 105 S.Ct. 1181 (1985).

Plaintiffs earnestly advance the argument that the blanket license, as applied to syndicated programming, should be declared unlawful for the basic reason that it is unnecessary. * * * *

There are two fundamental flaws in this argument. First, it has not been shown on this record that the blanket license, even as applied to syndicated television programs, is not necessary. If all the plaintiffs mean is that a judicial ban on blanket licensing for syndicated television programs would not halt performance of copyrighted music on such programs and that some arrangement for the purchase of performing rights would replace the blanket license, we can readily agree. Most likely source licensing would become prevalent, ... But a licensing system may be "necessary" in the practical sense that it is far superior to other alternatives in efficiency and thereby achieves substantial

saving of resources to the likely benefit of ultimate consumers, who usually end up paying whenever efficient practices are replaced with inefficient ones.

Id, page 932; underscoring added.

Our scrutiny in CBS and in the instant case fully verifies the conclusion that blanket licenses reduce the costs of licensing copyrighted musical compositions. They eliminate costly, multiple negotiations of the various rights and provide an efficient means of monitoring the use of musical compositions.

Id., concurring opinion of Judge Winters, page 934.

Buffalo Broadcasting is valuable in still a further sense as revealing the dead hand S.1980 would weigh upon a free and competitive market.

It describes in detail the presently available variety of licensing mechanisms for dealing in rights to synchronize and perform music in television programs, including source licensing where that is the most efficient choice for the parties (program license, page 926; direct licensing, page 928; blanket licensing, in passim). Together with its brief reference to the very important provisions for negotiating fees subject to court control through administration of the Amended Final Judgment (id., page 927), all of this cogently illustrates how S.1980, by banning from the marketplace all bargaining choices of sellers and buyers of rights to music synchronization and performance in television programs except source licensing, would force the replacement of "efficient practices" with an "inefficient one[]", to the "likely [detriment] of ultimate consumers, who usually end up paying" when that happens (supra).

Respectfully submitted,

ASSOCIATION OF NATIONAL
ADVERTISERS, INC.

Dated: April 16, 1986.

By:

DeWitt F. Helm, Jr.
President

Gilbert H. Weil
General Counsel

National Music Publishers' Association • Inc.

April 9, 1986

EDWARD P. MURPHY, President
March 1986 - 1986

The Honorable Charles McC. Mathias, Jr.
Chairman, Subcommittee on Patents,
Copyrights and Trademarks
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The National Music Publishers' Association ("NMPA") respectfully submits the enclosed statement for the record of the April 9 Subcommittee hearing on S. 1980, legislation to require source licensing of performance rights for music accompanying off-network syndicated television programs.

NMPA, a trade association representing America's popular music publishing business, strongly opposes S. 1980 and believes the measure should be firmly rejected. We commend the Subcommittee for the attention it has chosen to devote to a thoughtful examination of the source licensing issue. NMPA believes that the hearing record will demonstrate that S. 1980 advances no public policy objective, but serves only to advance the interests of local television broadcasters at the expense of the creative forces in America's music business.

NMPA deeply appreciates this opportunity to contribute its views for the hearing record. We would be pleased to provide additional information, should you feel it might be helpful to you, the Subcommittee, or members of your staff.

Sincerely,

Edward P. Murphy

Edward P. Murphy

* * *

STATEMENT OF THE
NATIONAL MUSIC PUBLISHERS' ASSOCIATION

The National Music Publishers' Association ("NMPA") appreciates the opportunity to express, for the record of the Subcommittee's April 9 hearing, its opposition to S. 1980,

a bill to amend the Copyright Act by mandating source licensing as the sole means of authorizing performance rights for music accompanying syndicated programs on off-network television.

NMPA is a trade association representing America's popular music publishing business -- the creative force responsible for bringing music to an enthusiastic public in the U.S. and around the world. We firmly believe that S. 1980 would make bad law and should be rejected because, by mandating source licensing as the only way in which copyright owners could convey music performance rights to local TV stations, it would:

- preclude the unfettered operation of the marketplace as the test for measuring fair compensation for one's creative work,
- eliminate blanket licensing, a fair, efficient and orderly system that has operated effectively in the United States and throughout the world for forty years,
- serve no public policy, and
- harm America's music creators and ultimately reduce the amount of high quality music used in television programming.

On the other hand, S. 1980 would create a windfall -- free music -- for the powerful local television stations who already reap high profits.

But, who are the music publishers and why are they so vitally interested in protecting America's music?

I. THE ROLE OF MUSIC PUBLISHERS^{1/}

The songwriter and the music publisher each make an essential contribution to bringing new music before the listening public. Without the songwriter, there would be no melody or lyrics; without the music publisher, much of our

^{1/} Leonard Feist, An Introduction to Popular Music Publishing in America (1980).

popular music would remain in obscurity. The important, if less visible, work of the music publisher, however, often goes unnoticed by all except those familiar with the music business.

A. Historical Perspective

In its early days, dating back almost to the invention of moveable type and the printing press, music publishers engaged in the printing and distribution of copies of musical works. In this way, music publishers made it possible for persons, other than a work's creator, to perform that work, in the home or on a concert stage, for the entertainment and enjoyment of listeners.

Technological advances in the late nineteenth and early twentieth century greatly expanded opportunities for the public performance of musical works. Industrialization and mass production made it possible for many families to own a keyboard instrument, increasing the demand for social "parlor music." New and faster modes of transportation enabled entertainers to take popular music to cities and small towns across the country and led to the birth of American vaudeville.

In the 1890's, a handful of creative individuals, determined to utilize these breakthroughs to promote new music, settled in what became known as New York's Tin Pan Alley. These pioneers of modern music publishing missed no opportunity to promote a song in their catalogues. Wherever people gathered, in vaudeville houses, theaters, or social clubs, new songs were "plugged" by their "salesmen" -- the music publishers.

The advent of recording and the emergence of movies, radio, and television created new media by which song publishers could promote their songs. New technology, with its potential to reach vast audiences, greatly expanded the

opportunities for promotion and permanently altered the nature of the music publishing business. It created a dynamic, ever-changing environment which required successful music publishers to develop diverse skills to ensure that a song received maximum exposure.

B. Music Publishing Today

We view publishers as our partners in a sense that is best described by the word "symbiosis." It is true that a publisher's work may not begin 'til our work is complete; but in the large sense, our work is not complete until they exercise their functions properly as publishers.^{2/}

Songwriting today is a full-time creative endeavor. So too is the creative business of music publishing. As a result, many songwriters choose to engage in a productive partnership with music publishers.

Arrangements between music writers and publishers vary. The songwriter and music publisher negotiate a contract to establish what services will be provided and how they will share in a song's earnings. Typically, songwriters and music publishers share equally in royalties received as a result of their respective contributions to a song's success.

Alternative relationships between artists and music publishers emerged in the mid-1960's to accommodate a new breed of songwriter/performers. A music publisher can administer the copyright on behalf of a songwriter/performer, or he may serve as co-publisher for a songwriter who has set up his own publishing organization. In the latter case, the co-publisher receives a lesser share of royalties in recognition of a diminished role in a song's promotion.

One needs to understand the nature of the music industry to take a proper measure of the publisher's role and

^{2/} Erwin Drake, quoted in An Introduction to Popular Music Publishing in America at 15.

how and why he is compensated for it. The tasks that a music publisher performs are essential to a song's success. Before a bar of a song is written, a music publisher often provides financial support to a composer. A music publisher also serves as a creative counselor, promoter, business affairs manager, and copyright administrator. He must possess a facility with people, an ear for music, and a detailed knowledge of every facet of the entertainment business. An understanding of the time, effort, and special talents that go into successful music publishing makes clear why so many artists choose to work with a publisher.

1. Creative Counselor

It is elementary that without a good song, neither songwriter nor music publisher can succeed. The creative department of a music publishing house has the responsibility of locating promising new material, writers, and performers. The music publisher must be able to identify an unpolished product or embryonic talent with artistic potential. This requires "an ear attuned to the public fancy, a nose for a song or an appealing beat, and a strong seat of the pants judgment."^{3/} As to songwriters/performers, a music publisher must be able to evaluate both the quality of performance and the marketability of a song.

Once a publisher locates a promising songwriter, he must use his knowledge of the popular music industry to help perfect a particular work or to refine a developing talent. Occasionally, he may "match-make" a productive collaboration between composer and lyricist or between songwriter and interpreter.

A music publisher must be able to judge the critical point at which a maturing artist or his work should be

^{3/} Id. at 73.

introduced. Often, the initial step in this process involves the production of a demonstration recording, or "demo," to be presented to record producers or recording company executives. A publisher will frequently bear the large expense of such an undertaking and will provide studio facilities and professional guidance to the artist.

2. The Promoter

To launch a new song or talent, the music publisher must secure the release of a commercial recording. Competition is keen and the publisher must exercise ingenuity and persistence in order to succeed in having a record company or producer use a work in his catalogue.

Promotion, however, only begins with the release of a recording. For a song to become popular, the publisher must ensure that the recording is carried to the public through as many media as possible: radio, movies, television, TV and radio advertising, live performances, and new or "cover" recordings of the song by other artists. Because a music publisher promotes all versions of a work throughout its copyright term, he must know each segment of the entertainment industry and develop close relationships with key contacts.

This comprehensive array of promotional activities is not limited to the U.S. or even to North America or to English-speaking nations. Recognizing the world's appreciation for American music, music publishers promote their clients' works around the globe through foreign offices, agents or affiliated sub-publishers.

3. The Business Affairs Manager

The music publisher must exercise commercial judgment in deciding which artists and songs show sufficient promise to merit the investment of financial resources and creative energies necessary for successful promotion.

In many instances, a music publisher and writer will enter a contract for a particular song or songs. In others, a publisher may decide to offer a writer/performer an exclusive contract for a term of years. An exclusive contract creates a special relationship between the songwriter and publisher. Under such an agreement, it is not uncommon for a publisher to provide a writer with advances against royalties, thus enabling that writer to concentrate on his creative craft, free of economic worries. (Music publishers are able to provide these advances to developing artists as a result of the stream of performance royalties accruing to the publisher through works that he has already promoted successfully.) The publisher also may provide his writer "partners" with modern sound studios and the latest equipment to encourage experimentation and foster creativity.

In addition, the publisher's role as business affairs manager frequently involves the negotiation of recording contracts, and of course, of licensing agreements.

4. The Copyright Protector

Finally, a music publisher protects the copyright upon which the livelihood of his songwriter partners, as well as his own, is based. To assure proper protection, a music publisher must understand not only the U.S. copyright laws, but also the copyright laws of foreign nations, and the international copyright conventions.

To assure appropriate authorization for uses of a work, music publishers list their works with branch offices, overseas affiliates, and performing rights societies.

There are literally hundreds of uses of a work, from broadcast in a television commercial to inclusion of lyrics in a high school yearbook. The publisher must decide whether permission will be granted, and what fee, if any, will be asked. Meticulous records must be maintained to

ensure that all fees are properly noted, collected, and distributed.

The array of important functions performed by the music publisher quickly reveals why so many songwriters, and particularly songwriter/performers, choose to direct their time and talents toward creating more music -- and elect a partnership with a music publisher who is skilled in promoting that music.

II. NMPA'S OPPOSITION TO S. 1980

NMPA strongly opposes S. 1980. The bill's proponents -- powerful local television broadcasters -- are asking Congress to give them free television music. In an attempt to gain through legislation what the courts have emphatically and repeatedly rejected, local broadcasters would have Congress destroy the freely negotiated blanket licensing system through which copyright owners of television music have been compensated for four decades. They ask Congress to erode the value of the music copyright owner's most cherished right -- the right of continuing payment for the continuing use of his work -- and seek to exploit that right for their own benefit.

A. Legislative Action Is Not Warranted

S. 1980 would prevent the free operation of market forces by legislating source licensing as the only method by which copyright owners could convey their music performance rights to local television stations. Moreover, the bill would further no public policy. It would diminish the value of the music creator's most important right -- the music performance right -- while making it possible for local television stations to pay nothing for music they broadcast.

S. 1980 is unnecessary; source licensing is an available alternative to the present blanket licensing sys-

tem. In the recent Buffalo Broadcasting case,^{4/} the U.S. Court of Appeals for the Second Circuit held that the blanket licensing system does not operate as an unreasonable restraint of trade; the Supreme Court denied review of the appellate court decision.

Specifically, the Second Circuit noted that, in addition to the blanket license, three other means are available to all local stations for licensing music performance rights: the "per program license" negotiated with a performing rights society to cover only those programs carrying the works in that society's repertory; the "direct license" negotiated between the music copyright owner and the TV station for the use of a particular work; and the "source license" under which the producer of a syndicated program obtains the music performance rights for the local TV station. The broadcasters now ask Congress to set aside the judgment of the courts, and to eliminate the existing marketplace options.

NMPA believes that the Subcommittee should reject the broadcasters' request for legislative intervention. S. 1980 tears down an efficient system that has worked for decades world over to assure fair compensation for copyright owners.

The broadcasters argue that the rates they are "forced" to pay for a blanket license are too high. The truth is that these rates are negotiated periodically between equal bargaining partners, the performing rights societies representing copyright owners and the All-Industry Television Station Music License Committee on behalf of the broadcasters. If these negotiations do not result in agreement, a

^{4/} Buffalo Broadcasting Co., Inc. v. American Society of Composers, Authors and Publishers, 744 F.2d 914 (2nd Cir. 1984), cert. denied, 105 Sup. Ct. 1181 (1985).

federal court will review the reasonableness of the fee proposal. And, blanket license fees have steadily declined over time. Using the American Society of Composers, Authors, and Publishers ("ASCAP") as an example, rates have fallen from 2.5 percent of net station revenues in 1949 to 1.15 percent today. This means that for the right of access to unlimited performance of any and all works in the ASCAP repertory, a local station pays a little more than a penny on the dollar. Given these declining rates, the 800 local television stations, who gross about \$12 billion annually, can hardly claim to have been disadvantaged in their negotiations with the performing rights societies. These stations collectively pay less than \$60 million per year for their blanket licenses and the comprehensive rights they convey.

What the stations really seek is free music. In Buffalo Broadcasting,^{5/} the Court of Appeals found that, prior to bringing their lawsuit, the stations had not sought to obtain performing rights by source licensing. Instead, a year and a half into the litigation, the stations created a "paper record" designed to show the unavailability of source licensing. In uncharacteristically strong language, the court recounted instances in which stations tried to "negotiate" a source license from the television producers/syndicators without offering any additional compensation for the purchase of the music performance rights.

Through the blanket license, or any of the other available licensing alternatives, local TV stations today can obtain the right to perform copyrighted music at a reasonable price. S. 1980 would eliminate all other possible options and force copyright owners into a single way of licensing

5/ Id. at 930, 931.

their property. By mandating source licensing, the bill does not guarantee that music performance rights will be licensed at reasonable rates; it merely relieves extremely profitable local TV stations of the obligation to pay copyright owners for the music they perform.

B. Erosion Of The Value Of The
Performance Right

The right of continuing payment for the continuing use of one's work lies at the heart of our copyright law. Continuing payment for continued public performance is the songwriter's and music publisher's most valuable right. A stream of performance royalties ignites and sustains the creative and productive forces in the music business; these payments enable writers to devote themselves to the creation of new and innovative works, and permit music publishers to provide financial support to developing artists. S. 1980 would erode the value of the performance right by depriving copyright owners of these continuing royalties and would ultimately silence new music and new musical talent.

Today, in order to integrate music with the action on the screen, the producer or syndicator of a television program acquires the synchronization or "synch" right. The separate performance right, logically, is licensed to the television station that needs this right to broadcast or "perform" the music.

Mandatory source licensing would turn this rational system on its ear. A source license for music performance rights is obtained from the copyright owner by a show's producer at the same time he acquires the synchronization right. By requiring the producer/syndicator to secure the performance right (which he does not need) before he may syndicate a show to a local TV station, S. 1980 would operate to "merge" the distinct synchronization and public performance rights

granted by the Copyright Act. As a result, in most instances, copyright owners would receive only a one-time, up-front payment for both rights, effectively eliminating continuing payment for continuing use.

The timing of the source licensing agreement severely disadvantages copyright owners. A source license is necessarily negotiated before a show is syndicated, long before either the composer or television producer can possibly know whether the song or show will become a hit and thus, long before the composer can know the value of his musical work. Moreover, producers would be unwilling and often unable to pay for the full value of the performance right. Because 97 percent of programs produced are never successfully syndicated, in most instances, producers would be unable to recover the additional cost of the performance right.

In this "crystal ball" negotiating atmosphere, only the works of the most famous composers might generate the payment of residuals for future performance. Most composers and their publishers would have little hope of receiving any more than a one-time buy-out for the use of a work. Copyright owners would be pressured into accepting inadequate compensation by the knowledge that a producer could choose to use less music, canned music, or public domain works. Moreover, because the performance of a song on television dramatically increases public demand for albums, tapes, compact discs, and sheet music, composers and publishers would be inclined to agree to whatever terms are offered rather than risk losing potential sales in other areas.

Proponents of S. 1980 assert that television production companies that have music publishing subsidiaries or sister corporations receive a "windfall" through the publisher's share of performance rights disbursements from ASCAP

and BMI. This simply is not true. Payment to the production company is for the use of a separate and distinct work, a television program created independent of any effort on the part of the music publishing arm. The blanket license performance fee, on the other hand, is compensation for the composer's and music publisher's respective contributions in making the accompanying music available. The music and television businesses are competitive artistic arenas. An affiliated studio, to enhance its product, uses the musical works that best fit its programming needs, even if that means using the works of other publishers. Publishers, to gain maximum exposure, will promote their works broadly among television producers.

Music is the single creative element of a television program that lives independent of that program. Gripping dialogue, elaborate costumes, an eye-catching set design, and captivating musical theme combine to produce an overall effect. But the musical theme alone can be enjoyed by the public in performances over radio, in nightclubs, through recordings, and at concerts. Other users of music pay for the public performance right, and broadcasters should be no exception.

NMPA respectfully urges that S. 1980 be rejected.

Before The Subcommittee On Patents, Copyrights and Trademarks
Committee on the Judiciary

April 21, 1986

Statement of Irwin Karp, Counsel
The Authors League of America

On: S. 1980/Source Licensing Of
Music for Non-Network TV Programs

The Authors League respectfully requests that this statement be included in the record of the Subcommittee's hearing on S. 1980, introduced by Senator Thurmond, which will compel composers of music for television programs to surrender to program producers the right to license performances of that music in non-network, commercial broadcasts ("broadcasts") of those programs. The Bill prohibits producers from granting TV stations rights to broadcast their programs unless the producers simultaneously grants the right to perform the music. At present, the right to perform those compositions in broadcasts are licensed on behalf of their composers and publishers by a licensing society (e.g. ASCAP or BMI) they voluntarily choose, under a system of blanket licensing which the courts have twice upheld, in dismissing broadcasters' antitrust suits against the licensing societies.

On behalf of its 14,000 author and dramatist members, The Authors League urges Congress to reject S. 1980 because it is unfair, unnecessary, and unconstitutional; and because its provenance is a grave threat and affront to the legislative process.

The Bill Is Unfair

1. Under the Copyright Act, the right to publicly perform a musical composition, by broadcasting a TV program embodying it, is a separate and divisible property right belonging to its author "which may be transferred and owned separately", as is every other right granted to authors by the Copyright Act. (17 U.S.C. Sec. 201(d)(2)) . The purpose of this "divisibility" is to allow authors to decide how and to whom they will license each of the property rights in their works, and to assure them the very choices that the Bill seeks to deny

to one class of authors -- composers of music for TV programs which are by transmitted by non-network broadcasts.

From the birth of television broadcasting, copyright owners of music have been entitled to make separate grants of : (i) the right to embody a composition in a television program -- licensed to the producer; and (ii) the right to perform the composition in conjunction with the broadcast of the program -- licensed to the broadcaster.

As we noted, the composer's and publisher's right to license, through ASCAP or BMI, the separate performance right to the entity that uses it, the broadcaster, has been upheld by the Federal courts. And the courts have rejected the arguments that broadcasters now press on Congress to rationalize the Bill. In the non-political forum of the courts, on the basis of non-partisan, painstaking and competent analysis of a detailed factual record, composers' and publishers' rights to thus license broadcast performances of their musical works has been found legal and workable. It would be grossly unfair for Congress to deny them those rights, and restrict the fundamental principle of "divisibility", in order to give an unnecessary and unfair bargaining advantage to one of the nation's most powerful and politically influential industries.

2. The Bill would compel composers of music for television programs to surrender their TV performance rights to the program producers although it is almost universally recognized that the bargaining power of a major producer is far superior to that of an individual composer, no matter how gifted he or she may be. While proponents of the Bill note that actors, writers, and directors of those programs receive "residuals" payments for each non-network broadcast, it must noted they are thus compensated for each use of their work because they are represented by unions whose collective bargaining power confronts that of a major producer... residuals for these artists are not the product of individual bargaining. Yet the effect of the Bill, and its obvious purpose, is to compel each composer to deal individually with a program producer, usually a powerful company, often owned by

a large motion picture corporation or an entertainment conglomerate. Thrust into that inferior position, most composers will have all the "freedom of contract" of a 1910 steel worker negotiating individually with U.S. Steel or Carnegie Steel. Inevitably, most composers will be deprived of the essential right to have their compensation based on the success of their music, measured by the frequency of its use.* This is a right composers now enjoy through the licensing of their works by their performance rights societies. It is a right actors, directors and screen writers obtain through collective bargaining agreements negotiated by their unions. (Even if there were justification for a bill mandating source licensing of TV performance rights in music, that measure would be grossly unfair unless Congress also permitted composer to bargain collectively through unions of their choice with television producers and other users of their work product. [Cf. National Labor Relations Board v. Hearst Publications, 322 U.S. 111, 127-8; fn. 26 (1944)]

The Bill is Unnecessary

1. There is something grotesque about the plaint of television broadcasters that they need the Bill to "protect" themselves against composers, licensing societies or program producers. Their exclusive licenses to use public property -- the television channels they control -- have made broadcasters powerful and wealthy. They have ample strength to bargain effectively under present law for musical performance rights and ample income to pay fair compensation to composers.**

Moreover, the courts have stressed that the broadcasters now have alternative means of varying the compensation they now pay for

*The Authors League agrees with composers' witnesses that the Bill's restraint effectively would limit their compensation to one fee paid when their work was performed, which would bear no relationship to the music's future value, thus depriving them of vast sums.

**"In the past year, private investors made close to \$10 billion selling broadcasting rights owned by the U.S. government. The Treasury received nothing. ... The Federal Communications Commission has allowed broadcasting licenses to be treated as if they were the property of broadcasters -- which they are not. U.S. taxpayers are the lawful owners of these frequencies ... " (Sell the Airwaves and This Time Pay the Owner, Sanford Pensler; THE WALL STREET JOURNAL, Feb. 27, 1986.)

musical performance rights, if they are not satisfied with their present ASCAP or BMI contracts. CBS v. ASCAP, 441 U.S. 1 (1979); Buffalo Broadcasting Co. v. ASCAP, 744 F.2d 917 (2d Cir. 1984), cert. den. 105 S. Ct. 1181 (1985). [See testimony of Register of Copyrights, Ralph Oman (March 19, 1986), pp. 13-21.]

Among other things, they have the right to request the District Court to set a reasonable fee if they believe ASCAP or BMI ask too high a price for performance rights - on a blanket license or per program basis. Indeed, broadcasters are now in the process of doing just that. We submit that this procedure of detached, impartial fact finding and determination is much better suited to achieving a reasonable solutions and fees than legislation to strip composers' of bargaining power, propelled through Congress by the enormous political power vested in broadcasters by their exclusive control over the public's television channels.

The Bill is Unconstitutional

The Bill is unconstitutional; it exceeds the constitutional limit on Congressional authority to enact copyright legislation because it "overreach(es) the restraints imposed by the stated constitutional purpose." Graham v. John Deere Co., 383 U.S. 1, 6 (1966).

(1966). The Supreme Court repeatedly has held that the purpose of the Constitution's patent and copyright clause was to "supply the economic incentive" for authors that would encourage "their individual creative efforts by personal gain", in order to "secure a fair return for an author's creative labor", and thus to stimulate the creation of literary and literary works for the public good. Harper & Row v Nation Enterprises, 105 S.Ct. 2218, 2230 (1985) (citations omitted)

The Bill has exactly the opposite purpose and effect. Moreover, it cannot be justified as a means of preventing anti-competitive conduct, under the commerce clause, since the courts have held that the licensing methods it seeks to prohibit are not anticompetitive.

The Bill also would violate the rights of composers under the Fifth

Amendment. It would deprive them of a property right granted by the Copyright Act (under Article I, Sec. 8, cl. 8) for the benefit of enormously powerful and profitable private interests. The Bill also singles out and deprives one class of copyright owners, authors and publishers of music for television programs, of the right of divisible ownership of rights in their works, and the freedom to license separately their right of public performance by television broadcasts. This, we submit violates their right to equal protection of law under the Fifth Amendment.

The Provenance of the Bill Threatens the Legislative Process

The Bill was generated and is pressed by corporations who hold almost-perpetual rights to use public property for their private benefit and profit. The public's television channels which they are allowed to control are one of the most important, probably the most important, means by which incumbent and opposition candidates for Congressional seats can communicate with their electorate. Under Sec. 315 of the Communications Act (47 U.S.C.) these broadcasters are exempt from any obligation to give Congressional candidates "equal opportunity" with respect to ("bona fide") newscasts, interviews, documentaries and coverage of news events. In short, the Congress has granted the broadcasters absolute discretion to either give or withhold television coverage of any given congressional candidate during an election campaign, giving one and denying another the exposure and access to the electorate that can determine his/her victory or defeat.

This enormous power over the electoral process, derived solely from the broadcasters' control over public property, creates an inherent and unspoken pressure on their behalf when they "petition" Congress for legislation that gives them a significant advantage over a group of creators and publishers whose property they wish to acquire by licensing procedures more acceptable to them, and much more profitable to them (and damaging to the owners of the property.)

The provenance of the Bill thus is a serious threat and affront to the legislative process. As custodians of the very public property

which gives them this enormous power to influence legislation, they should not be allowed to use it to benefit their own private, commercial interests. Such power used successfully to win a legislative victory over composers also can be used for even more detrimental purposes. There is even less reason to risk the reality, or even the appearance*, that broadcasters' control of public property can thus taint the legislative process, when the broadcasters have had several "days" in court and still have ample legal alternatives in dealing with American songwriters and publishers, and their licensing societies.

* For a sense of the "appearance" generated by the Bill's provenance, see the report in VARIETY, the entertainment industry's leading trade journal, on the recent NAB convention in Dallas: "LOOK MA, NO MORE B'CAST REGULATIONS", by Paul Harris (April 16, 1986, p. 35).

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April 22, 1986

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Honorable Charles McC. Mathias, Jr.
U.S. Senate
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Washington, D.C. 20510

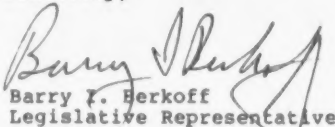
Dear Senator McC. Mathias, Jr.:

George David Weiss has asked me to send you a copy of the testimony he prepared for submission at the April 9, 1986 hearing held by the Senate Subcommittee on Patents, Copyrights and Trademarks on S. 1980.

Mr. Weiss is the President of the Songwriters' Guild of America and a member of the Songwriters' Hall of Fame. His many well-known credits include songs, such as "Lullaby of Birdland" and "Lion Sleeps Tonight;" Broadway shows, such as "Mr. Wonderful" with Sammy Davis, Jr.; and movies, such as "Mademoiselle." His work has been performed by many major stars, including Elvis Presley, Frank Sinatra, Charlie Rich and Bette Midler.

Our firm's client, Broadcast Music, Inc., Mr. Weiss and the Songwriters' Guild, and others have been working to inform the Senate of the terribly adverse consequences of this legislation for the creation of music and the public interest. I know you will find Mr. Weiss' testimony very informative on the subject, and I am pleased to transmit it to you.

Sincerely,


Barry F. Berkoff
Legislative Representative

BIB:nal

Enclosure

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S. 1980

STATEMENT OF GEORGE DAVID WEISS, PRESIDENT
THE SONGWRITERS' GUILD OF AMERICA
May 9, 1986

The organization for which I serve as unsalaried president represents approximately 4,500 songwriters in the United States and Canada. We maintain offices in New York, Los Angeles and Nashville.

In the fall of 1984, the United States Court of Appeals (Second Circuit) rendered a landmark decision in Buffalo

Broadcasting Company Inc. v. ASCAP et. al. That decision brought to an end interminable years of litigation involving the question of whether the "blanket license" issued by ASCAP and BMI to independent local television stations violated the anti-trust law. The Court of Appeals held that where there was a realistic opportunity to acquire rights to music and lyrics through other sources, the blanket license did not pose any anti-trust threat to the plaintiffs. In denying certiorari the U.S. Supreme Court signified an end to the litigation which challenged the legal effect of the blanket license.

The Court of Appeals decision, which is known far better to you than to most of the songwriting community, need not be reviewed. Only its highlights need be brought to the attention of this Committee for in denying that any anti-trust aspects were involved in the blanket license, the Court found that independent television stations had realistically available to them the per program license, source licensing and direct licensing each of which enabled independent television stations to operate outside the framework of the blanket license. The Court found that none of the realistic alternatives to the blanket license were ever seriously adopted by the plaintiffs and hence the plaintiffs had no cause to complain.

Indeed as the Court stated in response to a claim by the plaintiffs, the All Industry Television Station Music Licensing Committee, that the blanket license was itself suspect because there is no price competition among the songs comprising the ASCAP/BMI catalogue:

"a licensing system may be 'necessary' in the practical sense in that it is far superior to other alternatives in efficiency and thereby achieves substantial savings of resources to the likely benefit of ultimate consumers who usually end up paying whenever efficient practices are replaced with inefficient ones." (underlining supplied)

One of the presumptive thrusts of this bill is that it would significantly increase price competition among those supplying

music for background scoring. The Court, which had ample opportunity to study this issue, responded as follows:

"With this degree of price competition for music on syndicated programs already in place, it is entirely a matter of speculation whether replacement of the blanket license with source licensing would add any significant increment to price competition at the point where the syndicators decide which music to use. And since music is such a small portion of the total cost of a syndicated program to the television stations, and would still be even if performing rights were acquired at the source and included in the total price to the station, it is also a matter of speculation whether any significant increase in price competition for music would occur when television stations decide which syndicated programs to purchase in a world of source licensing."

It is interesting to note, and I repeat for the sake of emphasis, that music is such a small portion of the total cost of a syndicated program that the passage of this bill would not only fail to benefit the public but would deny songwriters payment for the performance of their music, resulting in significant loss to the profession and the quality of music. The only savings will be that of the independent television stations which would not be passed on to any other party.

Who is directly affected by the proposed legislation? In 1982 there were approximately 750 local television stations, 150 of which were independent and 600 which were affiliated with the three television networks. A number of those local television stations were owned by one group of companies. Compare this to the literally tens of thousands of members of ASCAP and BMI whose music is performed both in the United States and throughout the rest of the world.

Of the television stations mentioned above, all of them are monopolists over a given airwave. They secure a franchise from the Federal Communications Commission and my facts indicate that no renewal of a license has been denied to any television station since 1969. This, compared to the active competition of the literally tens of thousands of members of ASCAP and BMI each

seeking to secure their place in the writing of music for television programming and confronted by an entire monopolistic type structure.

The effect of the above is eminently clear: there is absolutely no bargaining strength of any individual songwriter when confronted with the configuration of an industry which holds a federal monopoly over a limited segment of the market.

When one adds to this the fact that the cost to the program producer of obtaining music is typically 2% or less of the total production cost one finds that this Committee has been asked to entertain a bill which would do nothing but enhance the welfare of a rather limited group of already protected and wealthy individuals to the detriment of the songwriting community. That community, as evidenced in hearings before the Copyright Royalty Tribunals some seven years ago to establish an increase in the mechanical rate, earns on the average \$5,000.00 from the writing of music and lyrics. Where then is the equity?

What rationale exists for Congress entering the marketplace and determining how rights, guaranteed to songwriters under the U.S. Copyright Act, should be marketed? The fact is that the selling price of television stations have soared. This bill would deny songwriters the protection of the Copyright Act which guarantees payment for performance and would place one price on the licensing of a performance right which, given the highly competitive nature of the songwriting community, would garner meaningless rewards for creativity. This bill is solely a benefit to the independent local television stations who need no protection having already received ample protection over their exclusive airwaves from the United States government. The bill dictates one time payments; provides for no re-use payments for songwriters' performances and even if it did, since ASCAP and BMI are barred from issuing licenses, there would be no organization available to license the performance of this music. The Harry Fox

Agency which operates in the record field, is not a licensing organization; it negotiates one time payments. Since composers and lyricists under a recent decision of the Regional Director of the NLRB are barred from joining as a union, no union can represent their interests.

The success of the independent television stations in drying up the market for quality music and supplanting it with music which they can buy at a one time price for little or no money is best exemplified by a situation which occurred a number of years ago the telling of which evidences nature of the problem. Some 18 years ago Charles Strouse and Lee Adams (having written "Bye Bye Birdie") were requested to write a title song for an unborn television series which eventually became known as "All in the Family". This was their first endeavor in the television field. The upfront money for the theme song was negligible. The writers jointly shared \$2,000, which included their costs for arranging, copying, recording, and hiring a recording studio and accompanist. (The 1984 Court of Appeals decision in the Buffalo Case noted that upfront payments varied from a "few hundred dollars to several thousand dollars.") While Strouse and Adams were selected because the program producer believed they would write "quality music" their upfront payment was, to say the least, modest.

"All in the Family" became a household fixture. "Those Were the Days", the theme song, became a standard. Today it is identified in the public mind not only with the success of this television program, but its music and lyrics have become a symbol of the theme, plot and characters of the program; even when performed independently of the TV series. Had Strouse and Adams not been compensated by payments from their performing rights organization which logged repeated showings of "All in the Family" commencing with network programming, through syndication, and foreign distribution, they would have received a pittance for their original creation. Everyone associated with the program

would have been handsomely compensated and quickly identified whenever the song was played, except Strouse and Adams. If the stations playing their theme were exempt from paying performance fees, it would have enriched no one but the station owners.

Performance of music is a concomitant, in television, with performance of a show. If a song is the theme of a totally unsuccessful television show then the song dies when the show dies. If however it is the theme of a highly successful show there is greater exposure and thus the greater the opportunity that the song will become a success both in the television program and in the marketplace outside the program. Continued use is the hallmark of success and payment for such continued use has always been the hallmark of the Copyright Act.

Testimony has been given that under the present "blanket license" system a small percentage of writers garner the largest share of revenue from televised performances of music. However viewed the ability to capture the public imagination and taste eventually places a very small segment of a particular group at the top. This is literally true in the field of sports, painting, theatre and publishing. In each, a mere handful garner the lion's share because of their talent. Furthermore this argument is misleading in its purported appeal to fairness to songwriters generally. The District Court opinion in the Buffalo case correctly points out that under source licensing the very same small group of writers may well continue to control the marketplace.

There is no public benefit to this bill. Even if reuse could be effectively monitored by songwriters, what would composers receive for reuse of their music on independent commercial television? Ideally in the mind of both the producers and the independent television stations - nothing! This bill does not require any payments for continued use, and the thrust of the market place would inevitably result in one-time payments, at minimal prices, garnering enormous savings for television

stations, none of which will resound to the benefit of the public. There is a falacious thread of reasoning that permeates the intellectual property field, to wit,: if the cost of the copyright can be reduced, or better yet eliminated, the public will benefit. While a supreficailly convincing theory, it has no basis in reality. No Broadway play, first run movie, book, or choreographic work costs the public less because the copyright fee is eliminated. Why? Because in all artistic endeavors the cost of the copyright is miniscule compared to the product into which it is integrated. And the same is most assuredly true for television movies or a TV series.

To quote the adage: If it ain't broke, don't fix it! As the Court of Appeals stated in Buffalo, independent television stations are able, now, to accomplish direct and source licensing of music - and have freely elected not to do so. Even during the pendency of the Buffalo Case, independent television stations made only colorable attempts to commence negotiations for source licenses, and in none of them did they actually offer additional payments to program producers for the acquisition of performing rights.

There are many industries which come to Congress seeking intervention to protect their economic well being. Special commissions are set up to make recommendations to Congress and the President regarding hardships. One need but look to the automobile, iron and steel, shoe and now the oil industries to realize the threat that may justify Congressional intervention. But the only threat that exists if this bill were passed would be to the quality and standard of living of America's thousands of songwriters. No threat exists to the proponents of this bill because they are a small well defined group of people who control the airwaves, the selling price for which has reached the multi-million dollar level in the past 15 years. Hardly does their plight justify Congressional intervention.

We urge this Committee and Congress to reject S. 1980.

Tatham-Laird & Kudner

April 30, 1986

The Hon. Charles McC. Mathias, Jr.
Chairman
Subcommittee on Patents,
Copyrights and Trademarks
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

As a partner in a large national advertising agency, I am deeply concerned that Congress is giving even the slightest consideration to S. 1980 and H.R. 3521. As you noted at the commencement of the April 9 hearing, this proposal by broadcasting companies to require "source licensing" of all music used in any "motion picture, prerecorded television program or commercial advertisement" would upset business practices that have been followed for two generations. Although the Subcommittee received a great deal of testimony concerning the impact this legislation would have on composers and motion picture producers, I fear that the danger these bills pose to commercial advertising will be overlooked.

Because broadcasters, by determining how much advertisers must pay for commercial air time, can and do pass the costs associated with blanket licensing along to our clients, I do not understand the motivation behind this legislation. Television stations are in the business of "performing," in a broad sense, creative works. Advertising agencies are in the business of creating new audiovisual works called

commercials. By shifting the obligation to obtain performance rights from performers to creators, S. 1980 would create an administrative nightmare for advertising agencies and destroy the only economically viable system for compensating composers.

Tatham-Laird & Kudner recently produced an ad for a pet food product known as "Lucky Dog." We decided that the song "With a Little Bit of Luck" from Lerner and Lowe's "My Fair Lady" fits the ad perfectly. Our experience with this ad vividly illustrates the enormous difference between the job we do today and the tasks the broadcasters would thrust upon us.

To use "With a Little Bit of Luck" in the commercial, we needed only to obtain the synchronization rights to the song. The ad could then be placed with any television station for either network or non-network broadcast. Because the broadcasters, through a blanket license, already possess the public performance rights to the song, the ad can be aired and Lerner and Lowe can collect royalties on a continuing basis.

Under S. 1980, however, Tatham-Laird & Kudner's administrative burdens would not have ended with the purchase of synchronization rights. We, not the broadcaster, would shoulder the burden of obtaining the right to perform the work by putting it on the air. Presumably, we could negotiate for a limited license to perform that song alone. More likely, we would try to avoid that cumbersome process by negotiating for a blanket license or by taking the music out of the ad altogether.

Each alternative would cause advertising agencies enormous headaches. The performing rights societies and the

ad agencies would have an exceedingly difficult time trying to decide how much a blanket license should cost. Advertising plans are subject to constant revision. It would be difficult for us to predict how much of a society's music we will use over any given period of time. For that matter, even after a specific ad has been produced, we do not know how many times it will be aired. The advertisers make those kinds of decisions on a continuing basis.

To negotiate a limited license for each song would be even more onerous. If Lerner & Lowe had to endure additional negotiation and paperwork every time someone wanted to use one of their songs, just imagine the increased costs they and each potential licensee would suffer! This would be mind-boggling, foolish and totally unnecessary.

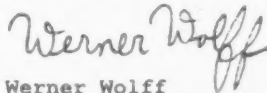
Nor could agencies easily remove themselves from the quagmire S. 1980 would create by simply commissioning new music for all their ads. Many of our clients want to use existing music, including some compositions that are 20 or even 40 years old, because the familiarity and recognition factor of a song may appeal to consumers.

I also find S. 1980 repugnant on more altruistic grounds. It should not take an economics professor to recognize that the present arrangement exists not just by tradition, but because it is the most economically efficient scheme available. Performance rights should be bought and paid for by the people who are in the business of performing creative works, not the creators of the works. Moreover, because television stations are the performance outlets for the commercials we create, the broadcasters are in the best position to amass the funds through which composers are eventually compensated. Similarly, the performing rights

societies are in the best position to distribute those funds in a way that compensates great works greatly.

Broadcasting is an immensely profitable industry largely because of the unfettered creative environment the present system has given us. For Congress to create a special rule for broadcasters by shifting the burden of obtaining performance rights from the broadcasters to advertising agencies would interpose a new, costly and wholly inappropriate road block in the creative process. Under S. 1980, I fear that the choice of music for advertising would be driven more by administrative than creative considerations. I implore the Subcommittee not to stifle the imaginations of our creative people in this manner.

Sincerely,



Werner Wolff
Partner and Director of
Broadcast Production
Tatham-Laird & Kudner

cc: Members of the Senate Judiciary Committee

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